UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: AUTOMOTIVE WIRE HARNESS SYSTEMS ANTITRUST

MDL NO. 2311

_____/

STATUS CONFERENCE / MOTION HEARINGS
(Redacted)

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Wednesday, June 7, 2017

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Detroit, Michigan
Wednesday, June 7, 2017
at about 10:05 a.m.

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(Court and Counsel present.)

THE CASE MANAGER: All rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Marianne O. Battani presiding.

All persons having business therein draw near, give attention, you shall be heard. God save these United States and this Honorable Court.

You may be seated.

THE COURT: Good morning.

THE ATTORNEYS: (Collectively) Good morning, Your Honor.

THE COURT: Molly told me there weren't as many people so I was expecting to see half a courtroom.

Okay. All right. Let's start with the report from the Special Master. Again.

MASTER ESSHAKI: Yes, Your Honor. Thank you very much. Good morning, everybody. It's good to see everybody and a beautiful morning in downtown Detroit.

I am pleased to report and have reported to the Judge that we had no motion hearings yesterday for the first

time in maybe two years. We had a couple motion hearings the end of last month, and as a consequence, we canceled our motion hearing for yesterday.

I noticed that we have scheduled the next settlement conferences for the 13th of September and December 6th, and we have also scheduled tentative motion days for September 12th and December 5th, so hopefully everybody will have that in your books and we can, if need be, meet again at that time. But things are just fine from the Master's side, Your Honor.

THE COURT: Okay. Does anybody have any questions for the Master or any issues that you wish to bring up before the Court for the Master?

(No response.)

MASTER ESSHAKI: He's doing a good job?

THE COURT: You must be doing an excellent job, Mr. Esshaki. Thank you.

All right. The next issue is the status of settlement, and I do have the report but I would like to hear your verbal --

MS. SALZMAN: Good morning, Your Honor. Hollis Salzman for the end-payor plaintiffs.

THE COURT: Good morning.

MS. SALZMAN: On behalf of the end payors and the auto dealer plaintiffs, we just want to inform the Court that

since the submission of the status report, we have ten additional settlements in principle. Those are not public yet but we hope to be able to submit those to the Court as soon as possible. The most recent settlement was this week on Monday with Toyo Tire closing the AVRP case.

After all of these next rounds of settlements are finalized, we will have 17 cases fully settled, and 13 of those cases with only one remaining defendant.

And with regard to the remaining defendants in the case, the indirect purchasers have either mediation scheduled or we are in deep discussions of settlement with the remaining defendants, or virtually all the remaining defendants.

The mediation --

THE COURT: When you say you have 17 fully settled, you are talking about 17 parts with the indirects?

MS. SALZMAN: Yes, correct, 17 auto part cases if you include these new ten additional settlements.

THE COURT: Okay.

MS. SALZMAN: And things have been going -- I know it's item number three, but while we are up here --

THE COURT: Yes.

MS. SALZMAN: -- things have been going very well with the settlement administrator, Judge Weinstein. We are in discussions with them on a nearly daily basis on

communications with the remaining defendants and scheduling discussions to further reach resolutions in the case.

THE COURT: And are you satisfied with the pace of this? I don't know what he's scheduling so that's why --

MS. SALZMAN: We are, Your Honor. We have been working very hard and have been very busy, especially with mediations.

THE COURT: Okay. Thank you.

MS. SALZMAN: Thank you.

MR. BARRETT: I would just -- for the auto dealers, Don Barrett.

Your Honor, I would just add that we are satisfied with the pace. We think the pace will pick up. Judge Weinstein has been, and Judge Rosen and the whole JAMS team, have been very vigorous in dealing with us, and we assume they have been as vigorous in dealing with the defendants, and we think it will show results. We think it is going to pick up very soon. We are satisfied, and we are working very hard.

THE COURT: Okay. I'm asking you and I look at the reports because you should know outside of a phone call from Judge Weinstein, I really have no interaction. I don't want to interfere with what's going on with whatever you are doing, I have no idea, but I like to get updated every once in a while.

MR. BARRETT: Yes.

THE COURT: We are continuing obviously with the case proceeding as we had planned.

MR. BARRETT: One thing, Your Honor, I would like to -- it is very nice that there's nobody sitting at the defense counsel table.

THE COURT: I see that.

MR. BARRETT: That's the way it ought to be and we --

THE COURT: For the interns here this summer, there are defendants, they are all here.

MR. STEVE REISS: I took that as a challenge, Your Honor.

MR. HANSEL: Good morning, Your Honor. Pardon my hoarse voice, Greg Hansel for the direct-purchaser plaintiffs.

MR. KANNER: And Steve Kanner for the direct-purchaser plaintiffs. Good morning, Your Honor.

THE COURT: Good morning.

MR. HANSEL: The direct-purchaser plaintiffs are diligently pursuing settlement discussions with various defendants. Before the Court appointed Settlement Master Weinstein, as the Court is aware, we had already been in discussions with many defendants. And in addition to the mediation process, which Steve Kanner will address, I think

it is an interesting, you know, benefit of the appointment of the Settlement Master that it has sort of reinforced the negotiations as well because everyone knows the mediation is coming so people are being diligent in negotiations as well.

So we are happy to report that in those negotiations we are very close but not quite able to publicly disclose at this stage very close to reaching resolutions with four additional defendants in more than four parts. To date we have signed settlement agreements with 15 defendants in 18 parts, and those settlements are at various stages of the motion for preliminary approval, motion for final approval process. There are several wire harness settlements scheduled, as the Court is aware, for final approval hearing on August 8th.

THE COURT: Okay. Oh, and, Mr. Hansel, did you do the agenda?

MR. HANSEL: Yes, in collaboration with probably everybody in this room.

THE COURT: Well, I want to thank you and thank everybody. It is a very, very helpful report to keep track of what is getting more and more cumbersome.

MR. HANSEL: You are welcome, Your Honor. Memory doesn't really allow to cover all of this so those reports are helpful for all of us.

THE COURT: Okay. Thank you. I used to think I

should know all of this, and then finally I said I can't keep it straight, I need something to look at, and that's extremely helpful. Thank you.

Mr. Kanner.

MR. KANNER: Good morning, again, Your Honor.

With respect to certain settlement issues, let's talk about wire harness first because that's the oldest of the cases. As I reported to the Court earlier, the -- there are three defendants that are left. I already mentioned to the Court that MELCO, while not yet settled, we are in the process of doing that, there are some issues with respect to settlement agreements which both sides are diligently working on, and I'm optimistic that we will get to a conclusion in the very near future. That would leave only two defendants.

With respect to those two defendants, and this crosses the threshold into mediation now, I do know that the mediators have been in contact with both of those defendants and direct-purchaser plaintiffs. With respect -- with respect to one of those defendants, a possible date is set for -- or at least has been met with some success in July. That defendant prefers not to have its name mentioned. There are issues in terms of agreeing to a mediator, and hopefully we can overcome that issue.

The other defendant, I'm told that it has been contacted by the mediators. We have not yet had any

discussions with respect to either a schedule or naming a mediator. And I highlight those because it is the oldest case and we are eager to move ahead one way or the other. Certainly those two defendants are obvious. We are going to be arguing a motion to dismiss later on this morning against one of those entities.

With respect to the next of the oldest cases, that, of course, would be bearings, and for purposes of our discussion I'm including the general bearings case, the industrial bearings, the automotive bearings and what we call small bearings. With respect to those, we have settled, as the Court knows, with Schaeffler and Minebea, and we have a mediation scheduled for June 15th with the remaining group of defendants. Judge Weinstein will be managing that process.

We also have a mediation scheduled with one the defendants in the following products: Starters, fuel injection systems, alternators, ignition coils, shock absorbers, break hoses and valve timing control devices. That is scheduled for June 27th and June 28th. And the schedule for the bearings, I didn't mention it, is set for June 15th.

So that's what's on our immediate calendar and we are eager to push ahead, but as the saying goes, it does take two -- or at least in the case of bearings lots more than two to tango, but we remain open and eager to address those

issues by mediation or by litigation.

And I think that covers what I have to tell you, unless you have any questions, Your Honor?

THE COURT: No -- well, I do have one question: In terms of there was one that you said there was a question about selecting a mediator.

MR. KANNER: That's correct.

THE COURT: There are a team of mediators as I understand it; is that correct?

MR. KANNER: There are. It doesn't always mean that both sides are going to agree to the team of mediators. In some cases outside mediators who have had no experience with these cases have been named. I can tell you from our standpoint, meaning the direct-purchaser plaintiffs, the mediating team that's involved in this case is knowledgeable and doesn't need any additional background work. They've done their educational side of the case so they are familiar with it. But beyond that, we don't remain opposed to outside mediators.

THE COURT: Okay. And they can select their own under the order for appointment --

MR. KANNER: They can, they can.

THE COURT: -- outside of this group?

MR. KANNER: That's correct.

THE COURT: And on the bearings, we do have -- the

class cert has been filed on the bearings, correct?

MR. KANNER: That's correct.

THE COURT: And we are proceeding with that?

MR. KANNER: We are.

MR. HANSEL: Yes. In fact, we can take care of one of the agenda items --

THE COURT: Jumping ahead.

MR. KANNER: One-stop shopping with us.

MR. HANSEL: -- Roman numeral III-A. And just to update the Court on that, the direct-purchaser plaintiffs filed our motion for class certification on March 20th. The non-settling five bearings defendants' opposition is due July 26th, next month. The plaintiffs' reply brief is due November 16th. Class certification is scheduled for hearings on January 11th, so it is moving forward.

THE COURT: Okay. Very good. That's actually the only part that we have the class cert going forward, correct? We will get to the others but --

MR. KANNER: That's correct.

THE COURT: Okay.

MR. HANSEL: Thank you, Your Honor.

MR. KANNER: Thank you, Your Honor.

THE COURT: Thank you very much.

MR. PARKS: Good morning, Your Honor. Manly Parks for the truck and equipment dealer plaintiffs.

With respect to the status of settlements, in addition to the settlements identified on the report, I'm pleased to report there's one settlement that we've reached that is very near being able to be disclosed publicly. We should have more information on that within about a week for the Court.

We've also been able to secure our first settlement in the starters and alternators case. The identity of the settling party has to remain confidential for now, but, again, a matter that should be able to be disclosed publicly very soon.

We have at this point one defendant left with the bearings case with whom we have not yet resolved things. We have one defendant left in the occupant safety systems case with whom we have not yet resolved things. And we are in active discussions, facilitated by Judge Weinstein's team, with virtually all defendants in all of our cases at this point. And we are pleased with the Settlement Master's efforts, level of engagement, and the progress we are making there.

THE COURT: Good. Thank you very much.

MR. PARKS: Thank you.

THE COURT: Anybody else?

(No response.)

THE COURT: Any defendants want to say anything?

(No response.)

THE COURT: Where's Mr. Iwrey? How come there's an empty seat right up here? My clerk informed me that you didn't have your coat, but you do have your shirt, right? Okay. If you want, we can adjourn until you go home and get your coat.

Okay. The next thing is the status of scheduling orders.

MR. WILL REISS: Good morning, Your Honor. Will Reiss for the end-payor plaintiffs.

So we have been negotiating the discovery plans for the next tranche of cases, so these are the cases in which the Court has entered an order scheduling class certification. We are the furthest along with the occupant safety systems case, and we would expect within the next, I would say, few weeks we will be in a position to enter hopefully a negotiated plan. To the extent that there are any differences or disputes, we will bring that before the Master.

THE COURT: Now, you had for occupant safety, that was scheduled for October of 2018?

MR. WILL REISS: That's correct, Your Honor.

THE COURT: So you're on target with your --

MR. WILL REISS: There are some disputes at this point in terms of document production issues, but we are

hopeful that we will be able to resolve them so that we are on target for that.

THE COURT: Okay. Thank you.

MR. WILL REISS: Thank you, Your Honor.

THE COURT: Anyone else?

MR. STEVE REISS: I was hoping that was the initial jury, Your Honor.

With respect to the radiators case -- the truck radiators case, discovery has started in that case, the plaintiffs served discovery on defendants, defendants have served discovery on plaintiffs, and we anticipate getting a proposed scheduling order to the truck plaintiffs shortly in the radiators case.

THE COURT: Would you put your appearance on the record, please.

MR. STEVE REISS: I'm sorry, Your Honor. Steve Reiss, R-E-I-S-S, for the Calsonic Kansei defendants.

THE COURT: Thank you.

MR. PARKS: Your Honor, just very briefly, Manly Parks on behalf of truck and equipment dealer plaintiffs.

Very briefly on the radiators scheduling order, my understanding is that there were some conversations primarily involving the indirect -- the other indirect purchaser plaintiffs groups and the defendants in radiators because the

indirect purchaser groups settled out of the radiators case. Those discussions were suspended. We were brought in right before those settlements happened, and we are prepared to pick up the ball where the other indirect purchaser plaintiffs left it in terms of those settlement discussions. And, in fact, we will be providing defendants with an updated version of the most recent draft that had been exchanged within the next few dates, maybe even later today if I get back to the office and can get it out in time, but we will be moving forward with that. Okay.

THE COURT: Okay.

MR. PARKS: Thank you.

THE COURT: Thank you. I just want to make sure at this point I've got the class action certs right. The bearings we've already talked about. The -- I'm talking about the directs now in the wire harness. That's been adjourned until after we have motions so we don't have a date on that, correct? Okay. And then the anti-vibration rubber parts was to have been filed April 10th, but instead I think we got a motion to dismiss; is that correct?

MR. HANSEL: Greg Hansel, again, for the direct-purchaser plaintiffs, Your Honor.

At the time the original scheduling order was entered in the anti-vibration rubber parts case, the direct purchasers had not yet filed the case, had not yet been

retained by the direct purchasers to file that case, so when we did file the case, it was well into the existing schedule for the other plaintiffs, and so we would probably need a separate scheduling order for the direct purchaser case in AVRP.

But as the Court is aware, there are -- there is a motion to dismiss which is now on its way to being fully briefed. The defendants filed the motion, direct purchasers have now filed their response, and actually just the other day the defendants filed their reply, so it is fully briefed now.

THE COURT: And I have a date --

MR. HANSEL: Great.

THE COURT: -- for a hearing.

MR. HANSEL: Okay.

THE COURT: I have set it for July 26th, if that works, at 1:00. We have other motions on July 26th, I think there's three of them, but I think if we set it for 1:00, we can get all three done.

MR. HANSEL: That date looks fine.

MR. STEVE REISS: Your Honor, switch hats, Steve Reiss for the Bridgestone defendants.

I'm scheduled to be in trial in Arizona on July 26th, and I would greatly -- I agree with Mr. Hansel, that motion to dismiss the direct purchaser case in the AVRP

case is fully briefed and so it is ripe for decision before Your Honor. I think oral argument would certainly be helpful. But I'm scheduled to be in trial in Arizona which I cannot move, it is a major trial, on July 26th, so if it is possible, Your Honor, I would appreciate some --

THE COURT: Anything is possible.

MR. STEVE REISS: Thank you, Your Honor.

THE COURT: Wait, don't go away. Let's find a date that's good. Mr. Hansel, come on back up.

MR. HANSEL: Your Honor, direct purchasers don't believe oral argument is necessary in that case.

MR. STEVE REISS: So you're going to concede?

MR. HANSEL: No.

THE COURT: Defendants want oral argument?

MR. STEVE REISS: Yes, Your Honor, we think that it will be helpful.

MR. RUBIN: Your Honor, could I suggest -- Mike Rubin, for the Amasha defendants in the AVRP case.

There's a direct purchaser final approval hearing set for August 8th. Would it be possible to schedule it around that hearing on that same day?

THE COURT: How is August 8th?

MR. STEVE REISS: That works for me.

MR. HANSEL: Yes.

THE COURT: Why don't we set it for August 8th.

The fairness hearing is at 10:00, so let's just do it after the fairness hearing.

MR. STEVE REISS: That's great.

THE COURT: So I will schedule it -- I will schedule it at 10:30, it may go, who knows, depending on what happens.

MR. STEVE REISS: Thank you, Your Honor. Much appreciated.

MR. HANSEL: Thank you, Your Honor.

THE COURT: Okay. Discovery, status of DOJ discovery.

MR. WILLIAMS: Good morning, Your Honor. Steve Williams for the end-payor plaintiffs.

THE COURT: Good morning.

MR. WILLIAMS: Our understanding is that the only cases in which the department still seeks a stay are the steel tubes case --

THE COURT: Pardon me?

MR. WILLIAMS: Steel tubes and body sealing products, and then any new cases that are filed, and that even as to those, the stay they seek is for testimonial deposition discovery, not documents.

Earlier in the case in January of 2015 the Court had ordered that in all cases that are in this situation where the DOJ doesn't seek a stay that the defendants should

produce to plaintiffs whatever documents they produced to DOJ. That's not been happening as much, and I think part of that may be because we don't have an order reflecting the status of the stay. So I think for plaintiffs, what we would request would simply be an order indicating that those productions in -- or alternatively, there is no DOJ stay in cases other than body sealing products, steel tubes and newly filed cases.

THE COURT: Could you prepare such an order?

MR. WILLIAMS: I will do so, Your Honor.

THE COURT: And make sure the defendants -- you submit it to the defendants, and if there's any objections to it --

MR. WILLIAMS: Yes.

THE COURT: -- the Court will hear them. Okay. All right. Thank you.

MR. WILLIAMS: Thank you.

THE COURT: Are there -- I hate to ask this, but does anybody know if there are more parts in the lineup coming up?

MR. WILLIAMS: It's very quiet. I don't have any information about that, Your Honor.

THE COURT: I didn't get that from the DOJ either. They are kind of quiet and it makes me nervous. How many parts did you say there were in a car?

MR. WILLIAMS: In a car?

THE COURT: 10,000, 12,000?

MR. WILLIAMS: They say that many, we would say fewer.

THE COURT: All right.

MR. WILLIAMS: And I'm going to stay for the next argument as well.

THE COURT: The OEM discovery?

MR. WILLIAMS: Yes, Your Honor. On OEM discovery, I first want to thank the Special Master for the work he did on what was an extraordinarily difficult, cumbersome, complex matter, and after today's argument to Your Honor, the last objection on the matters that the Special Master has decided will be either decided or under submission to Your Honor.

The next step as to those matters is to implement the orders for the serving parties to confer on whatever cost splitting has been ordered and how we will work that out, and then confer with the OEMs on the former production of the vendors to be used for pricing. Part of how those orders were resolved gives us the opportunity to negotiate the best prices for the work to be done.

And I should add, there has also been adjustments to what has been ordered, for example, because as the Court heard this morning, the AVRP case has been completely settled, so for the indirects, that take off the table some

discovery we might have otherwise sought. Things like that have happened in a number of cases which are narrowing the discovery we will seek from the OEMs, so that will be part of that continued process as well.

Second, the Court may recall that we had sort of created two tranches of OEMs, so we had first focused on those that we thought were at the core of the conduct involved in the case and we had put aside OEMs such as Ford, Mazda, Suzuki, Kia, Mitsubishi. I think the next step, and this has begun already, is to take what we have learned in the rulings that have been made on that first round, and then quickly with those additional OEMs in a more focused way, taking benefit of what we have gotten, to complete the process. To the extent that we need additional discovery from those OEMs, that process has begun, and we would anticipate the cost of all the work that is done, that should be a much shorter process now. We are not going to reinvent the wheel. We are just going to get to either agreements or bring matters to the Special Master for resolution.

Unless the Court has questions, that I think in broad terms cover the OEMs.

THE COURT: There are some things on that OEM discovery, but we are going to get into that in the argument on the motion with questions that I have.

MR. WILLIAMS: Yes. Thank you, Your Honor.

THE COURT: The next item is bearings but we've already talked about that, there is nothing else to be said. Okay.

The next thing is on bearings and radiators.

MR. STEVE REISS: Your Honor, I think the agenda item is whether to set a hearing date. It is our position, the defendants' position, again, I'm here for Calsonic Kansei, we think this motion can be decided on the papers. It is a very narrow issue. It is a discovery issue about whether certain files, less than 500 files, have to be produced directly to the defendants or whether the defendants have to run around and inspect. The Special Master ruled that the truck plaintiffs had to produce these files directly to defendants. The truck plaintiffs have objected. That argument -- that motion is fully briefed before the Court.

And the radiators defendants have simply moved to join the defendants' position in that case in order to keep discovery moving. We have the same issue -- we will have the same issue.

THE COURT: This is going up to Iron Mountain?

MR. STEVE REISS: Yes, Your Honor, exactly.

THE COURT: You want to get that done before winter.

MR. STEVE REISS: We would like to get it done, so we don't think there is any need for argument on that, Your

Honor.

THE COURT: Okay.

MR. SHOTZBARGER: Good morning, Your Honor. William Shotzbarger for the truck and equipment dealer plaintiffs.

We are certainly happy to hear for the first time that the radiators defendants agree that this dispute should be submitted on the papers because that's exactly what we told the Court back in January before the radiators defendants were involved in any of this.

And just one point to raise that was not made clear in the radiators defendants' reply brief recently filed. When the radiators defendants tried to start the wheels on this, they had not served any discovery on us at all, and so when we filed our objection to their notice of joinder and our opposition to their motion for leave, they had not filed -- they have not served, excuse me, any discovery on us. That has since changed; they served discovery on May 26th. And, you know, per our representation to the Court, this dispute should be submitted on the papers.

We are very happy where the bearings case is at now. We are very close to resolution. The radiators defendants really, you know, try to say that they are cooperating and striving for judicial efficiency, but radiators discovery is going on. We haven't even responded

or objected to their discovery.

OSS discovery is going on. We haven't yet responded or objected to Takata's discovery that was served on us. So, you know, to the extent that we can, we might want to put off a ruling to see where the OSS remaining defendant Takata comes in with this. We don't know whether or not they are going to join in the briefing. And we don't know what the radiators defendants' or the OSS defendants' position is with regard to the positions that were taken by the bearings defendants. It is the truck and equipment dealers' position that the bearing -- excuse me, that the OSS and the radiators defendants should be held to the exact same concessions and the exact same compromises that the bearings defendants made when we were getting to the objection that is at issue here.

So, you know, we are certainly willing to submit it on the papers, but, you know, we would like to see this play out a little bit before a ruling comes down.

THE COURT: All right.

MR. SHOTZBARGER: Thank you.

THE COURT: The Court is going to resolve it on the papers, and we will hold it for a little bit. Okay. Let me ask you how long do you think --

MR. SHOTZBARGER: Your Honor, I don't think we need that long.

THE COURT: What does that mean?

MR. SHOTZBARGER: A couple weeks.

THE COURT: We will hold it for 30 days.

MR. SHOTZBARGER: All right. Thank you, Your Honor. That would be great.

THE COURT: Okay. All right. The next matter is the electronic powered steering assemblies. Anybody want to speak to that? All we need to do is set hearing dates as I understand it.

MR. KANNER: Good morning, again, Your Honor. Steve Kanner on behalf of the direct-purchaser plaintiffs.

With respect to EPSA, I believe we announced at the last hearing, but we are much closer now to settling one of the defendants in EPSA; that's Yamada. And with respect to MELCO, that is on the list of products that we hope to be able to advise the Court in the near future that will be resolved. So those two defendants, those two EPSA defendants should be out of the action shortly.

THE COURT: Okay.

MR. EVERETT: Good morning, Your Honor. Clay Everett for the Showa defendants.

THE COURT: Good morning.

MR. EVERETT: So there still are two defendants in the direct-purchaser case in EPSA --

THE COURT: In the EPSA case?

MR. EVERETT: That's correct. So even if those settlements are completed, the motions we believe should still be decided.

THE COURT: Okay.

MR. EVERETT: And so we are happy to set those for argument.

THE COURT: All right. I had tentatively scheduled those also for July 26th at 1:00. Is that date, July 26th at 1:00, for the remaining defendants?

MR. EVERETT: That would work for the defendants.

THE COURT: Okay. All right. How about for Showa, is that the same?

MR. EVERETT: Yes. So I represent Showa, and that would be the same situation.

THE COURT: All right. So that would be July 26th at 1:00?

MR. EVERETT: Yes, Your Honor.

THE COURT: All right. In terms of the date for the next settlement conference, we have the next two scheduled for September 13th at 10:00 and then December 6th at 10:00.

Let's move ahead and get a third one just so everybody has time to schedule. I picked some dates, all of which are good for the Court, and you can tell me if there are any conflicts; they are February 21st, February 28th or

March 7th. Anybody have any comment on those dates? Is there any conflict for February 21st?

MR. VICTOR: If possible, March 7th.

THE COURT: If possible, March 7th. How about March 7th, any problems with March 7th?

MASTER ESSHAKI: Your Honor, I have a problem on the 7th.

THE COURT: You have a problem on the 7th?

MASTER ESSHAKI: Yes, Your Honor. The 21st and the 28th work.

THE COURT: How about the 28th? Okay. Let's do February 28th.

MASTER ESSHAKI: With a Master hearing on the 27th?

THE COURT: Yes.

MASTER ESSHAKI: Thank you, Your Honor.

THE COURT: So the motions on February 27th with the Master, and the status conference on the 28th.

Before we go into motions, is there anything else that anybody else wishes to bring up? We are all good.

(No response.)

THE COURT: Amazing. Okay. Thank you all very much.

And now we will move into Furukawa's second amended motion for summary judgment. Mr. Esshaki, you want to leave?

MASTER ESSHAKI: Thank you very much, Your Honor.

THE COURT: Thank you.

MR. DAVIS: Your Honor, we need to hook up a presentation. It might make sense to --

THE COURT: Why don't we take a ten-minute break then.

MR. DAVIS: Okay.

THE LAW CLERK: All rise. Court is in recess.

(At 10:40 a.m. court recessed.)

– – –

(Court reconvened at 10:56 a.m.; Court and Counsel present.)

THE LAW CLERK: All rise. Court is again in session. You may be seated.

THE COURT: Don't go hide, Mr. Iwrey. You can come up here. Okay.

MR. DAVIS: Thank you, Your Honor. Good morning. Ken Davis, with Lane Powell, on behalf of the Furukawa defendants.

Your Honor, I have spoken with Mr. Weill, who I understand will be arguing this motion on behalf of the DPPs, and we are in agreement that given the nature of what will be discussed in the argument this morning, it is appropriate to close the courtroom to all but those who have signed on the protective orders in these various cases, similar to the way that was done at the Denso hearing just a month or two ago.

THE COURT: All right. Are you asking for this whole thing to be sealed then?

MR. DAVIS: At this point, Your Honor, yes, Your Honor, until we have a chance to review the transcript to be able to sort through what may be unsealed.

THE COURT: As to what may be unsealed. All right. So anybody who is not involved would have to leave. We have asked our interns to leave so they are gone.

(Any parties not part of the protective order were excused from the courtroom.)

MR. DAVIS: Friendly faces. Your Honor, at its heart, this is really a very straightforward motion. What is the key to the resolution of this motion is not whether an illegal conspiracy existed but whether these plaintiffs can show that they were harmed by it.

All of the evidence in this case, Your Honor, is that the conduct in this case was directed to products sold to particular carmakers, Japanese carmakers in particular, such as Honda and Toyota, pursuant to specific RFQs that were sent to a select number of defendants of the carmakers' choosing for custom-made products that typically cost hundreds of dollars, took years to develop, and which products were suitable only for particular makes and models of automobiles. All of the conduct in this case and all of the evidence of the conduct in this case is that the targets

of that conduct were these products sold pursuant to RFQs to the OEMs.

Now, there is no question, for purposes of this motion, Furukawa does not dispute --

THE COURT: You are talking about the conduct of Furukawa only?

MR. DAVIS: Correct, Your Honor. I'm talking about the conduct in this case of all of the defendants.

THE COURT: All of the defendants.

MR. DAVIS: But I'm also here talking about specifically Furukawa's conduct, and there is no question and Furukawa does not dispute for purposes of this motion that Furukawa engaged in certain discussions with competitors regarding the pricing to these carmakers pursuant to this RFQ process that I just discussed. That's not at issue here.

Neither is there an issue that the real targets of the conspiracy and the parties, if any parties were harmed, the parties that were harmed, these particular OEMs, as this Court has seen, they are represented by some very talented lawyers who are very fully capable of asserting claims against individual defendants who supplied to them. That is not at issue in this motion.

What is really key to this motion, Your Honor, is whether these plaintiffs can build a bridge, Ambassador Bridge -- I can tell those who know Detroit a little bit

better than others -- that can build a bridge between the prices that they paid for the product that they purchased, and I will talk about what that product is in just a minute, with the conduct of Furukawa on the other hand. They have to build that bridge, it has to be built on facts, not conjecture or speculation, and that bridge -- without that bridge, the DPPs lose, and the DPPs acknowledge as much.

Now, there are two big hurdles that these plaintiffs face in trying to build this bridge. First and foremost, there is a big difference between who these DPPs

[redacted]

Second, there is a very big difference between the types of products that these DPPs purchased and the types of

[redacted]

[redacted]

Now, the plaintiffs admit these differences in their own complaint, and I will refer Your Honor to paragraphs 102, 103 and 105 of the third-amended complaint where the plaintiffs admit that the targets of the conspiracy were not themselves but rather were these select OEMs.

Similarly, Your Honor, Your Honor picked up on this in a prior ruling of this Court on an earlier motion to dismiss in this case, and I will refer Your Honor to docket number 100 and page 18 of your opinion in which you noted that DPPs admit that the conspiracy was directed at automobile manufacturers rather than themselves.

THE COURT: Are you -- are you then limiting your argument to the notion that the conduct that occurred is that -- is only that to which Furukawa pled guilty?

MR. DAVIS: Your Honor, if I can address the plea agreements because it's really --

THE COURT: Okay.

MR. DAVIS: -- the primary way in which these plaintiffs try to build that bridge that we are talking about here, and I will discuss that momentarily.

THE COURT: All right.

MR. DAVIS: So whereas all the conduct in this case concerns sales to OEMs like Honda and Toyota pursuant to RFQs sent to select defendants for custom-made product that took years to develop and cost hundreds of dollars to purchase that were suitable for use only in particular makes and models of automobiles, these DPPs who bought terminals and connectors were none of them.

Now, Your Honor gave me a good segue, how do the DPPs try to build this bridge between the prices that they paid for these terminals and connectors with the conduct of Furukawa on the other hand? First and foremost, the plaintiffs rely on the plea agreements of the various parties, and particularly -- and really the plaintiffs put the vast majority of their eggs in this one basket of the plea agreements. The plaintiffs argue when Furukawa pled guilty to certain conduct in paragraph 4B of that plea agreement, it pled guilty, and this is the key phrase, with respect to conduct of fixing -- or bid rigging with respect to, quote, automotive wire harnesses and related products. That's the key phrase here, Your Honor.

Furukawa knows that that phrase refers to the fact

that Furukawa engaged in certain conduct with respect to certain of those related products, and the related products are listed under paragraph 4A as ten distinct products. And the plaintiffs maintain that Furukawa pled guilty with respect to sales of each and every one of those ten related products notwithstanding the fact that Furukawa didn't even sell or manufacture five of those ten products, and those five are in black here on this screen.

They also maintain that Furukawa pled guilty to each and every one of these ten products notwithstanding the fact that there is no actual evidence to show a conspiracy that Furukawa was involved in with respect to many of those products, and we'll talk about that more in a minute as well.

Now, why does the plaintiffs' argument that this phrase, related -- and related products, allegedly means each and every one of the products, why does it not make sense? Before I address that, Your Honor, I want to point out two basic legal principles that apply here. The plaintiffs seek to admit the guilty plea pursuant to Federal Rule of Evidence 803, sub 22 I believe, which they can do, but only for purposes of showing facts that are, quote, essential to the judgment. Whether Furukawa pled guilty to wire harnesses, to some of the related product, to all of the related products, those are not facts essential to this judgment and therefore the plea cannot be admitted for that purpose. That's legal

principle one.

Legal principle two is that the law is clear, and this is citing to the United States v. Bowman case of the Sixth Circuit, that any ambiguity in the plea agreement has to be construed in favor of Furukawa.

So on either of those two legal principles alone, the plaintiffs' interpretation should be dispensed with, Furukawa's interpretation should be accepted by the Court.

But even leaving aside these two legal principles, why doesn't plaintiffs' interpretation make sense? Well, first and foremost, the plaintiffs' interpretation would render the plea agreement internally inconsistent. Why? Because in paragraph 4A Furukawa states -- or the plea states rather that Furukawa made and sold wire harnesses and related products. Under the plaintiffs' interpretation, that would mean that Furukawa was admitting in paragraph 4A that they made and sold each and every one of those ten products, but we know that is not true. You cannot accept that interpretation in paragraph 4B that the phrase refers to each and every one of the products and have it be read consistently with 4A, it just is simply not possible.

Furukawa's interpretation and understanding of the agreement to -- on the other hand is completely consistent between 4A and 4B because it is true that Furukawa conspired with respect to certain of the wire harness products, and it

is also true that they manufactured and sold certain of the wire harness products.

Now, for that reason plaintiffs' argument or interpretation should be rejected. But even if it is not rejected and even if you disregard the two legal principles that we talked about earlier, it still doesn't get the plaintiffs anywhere. Why? Because the plea agreement is crystal clear that every time there is a mention of conduct, what do you see? You see that the plea agreement is clear it refers only to the conduct with respect to sales to automobile manufacturers pursuant to this RFQ process that we've been discussing and for products that are suitable only for particular makes and models of cars.

In 4B alone of the plea agreement there are four different instances where the conduct is described, and the plea goes out of its way to make clear that the conduct refers only to conduct with respect to those products sold to these OEMs. There is nothing in the plea agreement to suggest that the types of products that were purchased by these DPPs were in any way affected, targeted or anyway involved in the conspiracy at issue.

And if you want to eliminate any doubt that this conduct that is described in the plea is only directed at the OEMs, one need only look at the information, which, of course, was filed contemporaneously in this case with the

plea agreement. The information up front in paragraph one it makes clear the conduct related to automobile manufacturers. Paragraph five, paragraph six, paragraph seven describes the conduct again in the context of automobile makers. And to leave no doubt whatsoever, paragraph eight, paragraph eight is a laundry list of various things that Furukawa was charged with doing, and each and every time, seven different times where there is conduct described, it makes clear we are talking about this OEM process, we are not talking about anything else.

So there's nothing in the four corners of the plea agreement to suggest or to support this bridge that the plaintiffs need to build to connect the prices of the product that they bought with Furukawa's conduct.

Now, Your Honor, the plaintiffs point out that the plaintiffs are not limited to the metes and bounds of the plea agreement, that they are entitled to prove a conspiracy that goes beyond that which is described in the four corners of the document. That is true, we don't dispute that, and Your Honor noted this in Your Honor's prior opinions regarding motions to dismiss, all of that is true. But the point is they need to prove it, they need to prove it. At the motion to dismiss stage, all they had to do was allege it. We are past the motion to dismiss stage. At the summary judgment stage it is incumbent upon the plaintiffs to come up

with facts to support their version of the conspiracy that is broader than one that is described within the plea agreements, and they have not done so, and they have not done so, Your Honor, despite the fact that we are now five years into this litigation.

And I do note on the agenda for the status conference today the date of the hearing was noticed as the year 2107, and I'm sure that was a Freudian slip, but it has been --

THE COURT: No.

MR. DAVIS: No. Very good. But it has been five years, Your Honor. The plaintiffs have had scores of depositions in this case. By my own count, there have been 118 days of just the defendants' witnesses alone. I know, I sat through a lot of them and I bear the scars to show it. There have been nearly 12 million documents, not pages, documents produced by the defendants to these plaintiffs in this case. And most importantly, the plaintiffs have enjoyed the cooperation not only of the amnesty candidate who, pursuant to the ACRA statute, is required to provide cooperation to gain the benefits of that statute to the plaintiffs, the plaintiffs have now settled, as you heard in the status report earlier this morning, these DPPs have now settled with eight different defendant families. And those settlement agreements were publicly filed, and you can see in

those plea agreements there's a very specific and very strict provision that each of those settling defendants is required to provide very stringent cooperation with the plaintiffs to assist them in pursuing their claims against the remaining defendants.

Despite the 118 days of depositions, despite the 12 million pages of documents, and despite the cooperation of eight different settling defendants here, you don't see any evidence. You can bet your bottom dollar that the day this motion was filed the plaintiffs got on the phone and talked -- or tried to talk with each of these eight settling defendants saying give me something, something that shows that the prices, that this conspiracy affected the products that we bought. You don't see a declaration, you don't see deposition testimony on point, and you don't see documents that show this as well.

So while it is true that the plaintiffs are entitled to prove their case beyond the metes and bounds of the plea agreement, they just haven't done so, and they have to do so now; at the motion to dismiss stage, fine, but we are past that.

Now, as I mentioned, the plaintiffs put the vast majority of their eggs into this basket of the plea agreement. So they do make some passing references to other theories to build this bridge to show that the prices that

they paid for their pennies apiece terminals and connectors somehow were affected by Furukawa's conduct. And I'm not going to try to chase every rabbit down every hole here, but I will try to hit some of the highlights and try to do so quickly.

This next issue, Your Honor, is that the plaintiffs argue that the bids that Furukawa and the other defendants submitted to the OEMs were done on a part-by-part basis. And the plaintiffs argue, and this is from page 8 of their brief, that rather than separately conspiring on each wire harness part in isolation, the fact that they did -- they submitted these bids altogether shows the, quote, interrelated pricing of wire harness products. Well, that's a good theory, but the two documents the plaintiffs cite in support of this simply don't stand for that proposition. There are two exhibits, Exhibit 44 and Exhibit 56, that the plaintiffs cite for this proposition that there is some interrelationship of the pricing of the wire harness product.

Let's take a look at 44. And I apologize, this is a fairly convoluted document which doesn't show well in a PowerPoint, but the important thing to know is that this is one of these in-the-room type documents where three competitors are discussing and memorializing in this document the proposed order in which they will finish on a component-by-component basis for this model that was to be

sold to Honda. In this case it pertains to the 2008 Honda Accord. Okay.

And in the middle -- in the light gray shading in the middle you see the numbers 1, 2 and 3, and we know through deposition testimony that those numbers refer to the proposed order in which the three competitors would finish with respect to the bidding for those particular components.

Now, the plaintiffs cite this document for the proposition that there is an interrelationship of pricing of the wire harness products. The problem is those products that are on the left-hand column there are not wire harness products, those are wire harnesses. For example, you will see R cabin refers to right cabin harness, instruments refers to the instrument control harness, there is a floor harness, an air-conditioning sub-harness, these are all wire harnesses. They have nothing to do with wire harness products, the ten enumerated categories that we saw in the plea agreement, so they can't necessarily have anything to do with respect to the interrelationship of the pricing of those products because they don't discuss the products at all.

Similarly, Exhibit 56, this one is a little clearer to read but a little more cryptic at the same time. And again, this is one of those in-the-room type documents which show specific pricing of the three competitors who were discussing pricing again with respect to the 2008 Honda

Accord, and the entries -- or Sumitomo, Yazaki, Furukawa.

On the left-hand side are a series of parts numbers. Now, the parts numbers are numbers, they don't mean anything, but if you are to decipher what those part numbers are referring to, they don't refer to wire harness products, Your Honor. They refer to specific wire harnesses that go into that automobile and how that bid is composed of a number of different wire harnesses. So, again, this document doesn't have anything to do with wire harness products, much less the alleged interrelationship of the pricing of the those products.

The next way that the plaintiffs try to build this bridge between the prices they paid for their pennies connectors with the conduct of Furukawa on the other side is that somehow the wire harness products are functionally interrelated. So they argue, well -- and this appears on the first page of the brief -- the products are functionally interrelated. First of all, just because the wire harness products are functionally interrelated doesn't mean the products these plaintiffs bought are functionally interrelated with anything, but even if it did, so what?

For example, this clicker, my wife calls it a clicker zapper, is functionally related to the computer that is projecting onto the screen through the projector. Now, the clicker and the computer and the projector are all

functionally related certainly, but that does not mean that their prices are interrelated in any way, it does not mean that at all. So even if it is true, and there is no evidence really in the record to show that the wire harness products are functionally related, and even if the products that these plaintiffs bought were those products, and they weren't, just because they are functionally interrelated does not mean there is any relationship between the pricing of the products, and therefore there is no basis to build this bridge between the pricing of the plaintiffs' products that they bought and these custom-made wire harnesses that took years to develop, cost hundreds of dollars and were made and useful for only particular makes and models of cars.

And trying to wrap up, Your Honor, the fourth thing I wanted to point out, and this is hit upon a little bit in plaintiffs' brief, is this concept of APRs or annual price reductions. [redacted]

[redacted]

But most importantly, the fact remains that these APR discussions are originated by the OEM for products that are sold pursuant to -- you've heard this before -- an RFQ process for custom-made products that took years to develop, only for those products, not these products.

And it is not like these plaintiffs, small companies, you know, God bless them, America is built on small companies, but it is not like these companies came to the Yazakis and the Sumitomos of the world and say I'm paying a penny apiece for these things, I really want a three percent discount. That didn't happen. In fact, the [redacted]

[redacted] So this concept of the APRs is simply not pertinent to this discussion at all. [redacted]. Without evidence of an agreement, there is no liability, and so this issue is simply moot.

Finally --

THE COURT: Is there a relationship between the OEM prices they paid and list prices?

MR. DAVIS: No, Your Honor. The prices that the OEM paid were for just for these custom-made products. They said give us a bid for the left cabin harness or the right cabin harness or the instrument control harness.

THE COURT: But for something like this little piece that you are showing, is it off the shelves?

MR. DAVIS: You will not find pricing for this product in the record that was submitted to the OEMs, period, you will not find it, so there is no connection on this record, none.

The last point that I wanted to bring up, Your

Honor, regards this concept of commercial rights, and this is a little bit more complicated but I will try to simplify it. The concept of commercial rights refers to the fact that there were discussions amongst the competitors to respect an incumbent's business to a particular OEM.

So that, for example, if one supplier supplied a particular type of harness to Honda for one make and model of automobile, there might be an understanding in any particular instance that that supplier would agree to succeed to the same product for the next model of that automobile.

And the plaintiffs argue that somehow this has anything to do with the products that they purchased. Well, first of all, it doesn't. But secondly, similar to these APRs, there is no evidence that this concept of commercial rights has anything to do except for the OEM process.

Again, these plaintiffs are not carmakers. There were no discussions about similar issues with respect to sales to these particular plaintiffs or any similarly situated plaintiffs, it wouldn't make sense.

So commercial rights is not a basis of facts to build this bridge between the prices that they paid for the products they purchased and these custom-made hundreds of dollars suitable only for particular makes and model of cars that took years to develop to customer specifications, no connection.

Now, in a final attempt to build this bridge, the plaintiffs say, well, wait, we need some discovery from Furukawa's expert to be able to defend against this motion, and that may be -- or that is, in my view, very telling. Plaintiffs all but admit here they lack this evidence to show a connection between the products they purchased, the price of the products they purchased and the conduct at issue, and they somehow need discovery from Furukawa's expert to get it.

Now, the problem here, of course, is Furukawa's expert isn't going to provide any evidence to help them out here. There is just simply not an issue. Fact discovery has been closed for months now. I mentioned 118 days of deposition, I mentioned the 12 million documents. We are long past that. It is time for them to come up with their case.

Furthermore, Federal Rule of Civil Procedure 56 only applies to fact discovery needed to create an issue of fact, it has nothing to do with expert discovery. And these plaintiffs notably they have experts. We know this because in the bearings case, which is going forward to class cert, as Your Honor noted earlier, these plaintiffs filed expert reports from two different experts testifying as to many of these same issues, and they have these experts at their disposal. They could have asked them for an opinion here that somehow there is some relationship between the prices --

the pennies they paid for the products they bought and these custom-made products that were sold to the OEMs, but you don't see it. Similar, the way you don't see any assistance from any of the eight settling parties, you don't see it. Why? It doesn't exist.

And after five years of litigation, Your Honor, it is completely appropriate at this juncture to end this litigation. There is no injury to these plaintiffs. All the targets of the alleged conspiracy, namely OEMs, have been and are able to assert claims on their own. These plaintiffs are not those OEMs. Thank you.

THE COURT: Thank you. Okay. Response?

MR. DAVIS: Do you have a slide show, Randall?

MR. WEILL: We will see how it goes. We have to switch over the equipment.

MR. DAVIS: Fair enough.

MR. WEILL: Thanks, Ken.

While Mr. Fink is working on the equipment, my name is Randall Weill representing the direct-purchaser plaintiffs. Nice to see you again in connection with this summary judgment motion.

I don't need anything right now, Nate, but are you all set?

MR. NATE FINK: It should be coming up.

MR. WEILL: So why don't I start and see how we do

with any graphics that show up.

THE COURT: Okay.

MR. WEILL: First of all, Your Honor, I would like again to ask the Court to understand that from our perspective as the subject of this summary judgment motion, we believe we are entitled to all the reasonable inferences that arise out of the evidence, which we think there are a considerable number.

Secondly, Mr. Davis was very insistent about our direct-purchaser plaintiffs only purchased terminals and connectors. I am not quite sure what the strip he had there.

[redacted]

So to start with the plea agreements which Mr. Davis started with, and I don't know if the Court -- well, hopefully we will be able to read this without much

difficulty, but the plea agreement on page 3 of the Furukawa plea agreement is very explicit about what we are talking about here.

And as the Court can see, it's discussing automotive wire harnesses are the automotive electrical distribution systems used to direct and control the electronic components and circuit boards, and the following are defined as related parts, and we have talked about this, these various components of the wire harness and other -- itself as well as the adjunct pieces like relay boxes and junction boxes, and we had a discussion about that at the Denso summary judgment motion.

Could you go to the next page, please, Nate?

Now, the plea agreement itself is very specific. It says during the relevant period the defendant, through certain of its officers and employees, including high-level personnel, participated in a conspiracy with other persons and entities engaged in the manufacture and sale of automotive wire harness and related products, the primary purpose of which was to rig bids for and to fix, stabilize and maintain the prices of automobile wire harnesses and related products.

So the notion that the conspiracy that we are discussing here is limited to related products is simply not accurate. It comprises the wire harnesses, it comprises the

pieces of the wire harnesses, and it comprises the adjunct parts like the relay boxes and fuse boxes that Furukawa makes as well as body ECUs that Denso and other parties make. It is the whole panoply of products.

Now, for the purpose of the plea agreement, there is a reference to some notion that the plea is ambiguous because this mentions the definition of related products includes products that Furukawa couldn't possibly have conspired with respect to because it doesn't manufacture or at least it doesn't sell them. But what Furukawa fails to mention is they pled guilty to a conspiracy to fix the prices of these products.

And if I may cite the case of U.S. v. Hughes, a Sixth Circuit case that's in our brief, it makes clear that a conspirator need not to have agreed to commit every crime within the scope of a conspiracy so long as it is reasonable to infer that each crime was intended to further the enterprise. So it is not necessary that Furukawa had to engage in some conspiracy for every related part or for every wire harness if its co-conspirators were engaged in such discussions and reached such agreements to fix these prices because it is part of the broader conspiracy.

And Mr. Davis mentioned, of course, that they do acknowledge that they were engaged in a conspiracy; we will talk some more about with whom. But I will say up front that

the primary people with whom they had their discussions were Yazaki and Sumitomo and Fujikura as the four principle wire harness conspirators and each of those conspirators had discussions with others. Sumitomo, we know, had price-fixing discussions with Denso about body ECUs.

But anyhow, continuing with U.S. v. Hughes, it says also that it is not necessary for each conspirator to participate in every phase of the criminal venture provided assent to contribute to the common enterprise is present. And the plea agreement is prima facie evidence that they consented, they agreed, they acknowledged they -- that they -- that they participated in this price-fixing conspiracy that involved all of these parts, wire harnesses and related products. Whether they sold them is irrelevant.

In fact, it becomes important, as we will discuss when we speak about the practices themselves, in some instances they withdrew themselves from any participation in trying to sell such products because that was an aspect of the conspiracy to respect each others market shares, their commercial rights, this allocation notion, and we will go into that in a little more detail.

But sticking with the guilty plea for a moment, I think there's some other information that's also especially helpful and that relates to the allocution that took place in connection with the presentation of this guilty plea, and

that's Exhibit 2, Your Honor, of the exhibits that were submitted in our opposition.

And it is a lengthy allocution but I think there are some pieces of it I think worth describing. It was -- the person present was a Mr. Kashiwagi who is from the -- he's the general manager of Furukawa's legal department. And I'm looking at page 6 of the allocution and I'm reading certain parts of it. For example, the Court asks whether Mr. Kashiwagi has been given authority to enter into the Rule 11 plea agreement.

He says yes, Your Honor.

Has the board authorized you to do so?

Oh, yes, Your Honor.

Have you gone over this Rule 11 agreement carefully?

Yes, Your Honor.

And this plea agreement was also reviewed and approved by the board of directors?

Yes, Your Honor.

So the notion that there's some ambiguity or, as Furukawa tries to argue on page 7 of its reply brief, that this agreement is ambiguous, that we really have to read certain words into it that it says actually that Furukawa was involved in a conspiracy to fix the prices of one or more of these parts is not correct. This witness, this gentleman

from the legal department of Furukawa, looked at that plea agreement and acknowledged that both he read it, he approved it, and the board of directors of Furukawa approved it, but there's more.

Now, the Court, as is customary, will go through the -- what the rights are that the defendant, in this case Furukawa, is giving up when it agrees to the plea, and the Court goes through a statement I believe beginning on page 12. It says what the government has to do to establish a violation, and it has to prove that at least two persons or entities got together to enter into an illegal agreement or conspiracy to restrain trade. You understand that, Mr. Kashiwagi?

Yes, Your Honor.

And, secondly, the government has to prove that Furukawa as a company voluntarily entered into the agreement. You understand that, Mr. Kashiwagi?

Yes, Your Honor.

And thirdly, that Furukawa understood the object and purpose of the agreement to restrain trade?

The witness -- excuse me, Mr. Kashiwagi: Yes, Your Honor.

So it was clear the Court was asking Furukawa do you understand what it is, the rights are, that you are giving up?

And then it says on page 14, The Court: How then do you plead to the charge of conspiracy to restrain trade on behalf of Furukawa, guilty or not guilty?

Mr. Kashiwagi: Guilty.

He then goes on, page 15, to make a statement -- at the bottom of page 14 but then page 15 he starts to make the statement by the company of what they did, and it's familiar. I will start from page 15, the first paragraph: From the time period listed in the information, that is, approximately from January 2000 to January 2010, officers and employees of my company had discussions with employees of competitors that also manufactured and sold automotive wire harness products -- excuse me, automotive wire harness products, yes, excuse me. These discussions took place in face-to-face meetings or by telephone. The discussions took place in the United States and elsewhere. During such meetings and conversations a conspiracy was formed and agreements were reached to allocate the supply of automotive wire harnesses and related products sold to automobile manufacturers on a model-by-model basis and to rig bids quoted to automobile manufacturers for automotive wire harnesses and related products.

Then in the next paragraph, and I think this is especially significant, therefore, as a result of these meetings, my company produced and sold automotive wire

harnesses and related products that were the subject of illegal price-fixing agreements that my company had made with competitors. These products and payments for those products traveled in interstate commerce and foreign commerce and substantially affected interstate and foreign trade and commerce.

There is no mention here about restricting this affect to automobile manufacturers. Mr. Kashiwagi is saying yes, we reached these agreements and, yes, we sold these products, these wire harness and related products at illegal prices.

So, first of all, the plea agreement and the related allocution put a hole in the notion that Furukawa is saying we couldn't possibly have impacted anybody but the specific RFQs. In other words, they are arguing this is an RFQ-by-RFQ conspiracy. We never dreamed that we would have any connection on this bid-rigging process with the bid-rigging process we had before, or do we have any notion that it would have any impact on the RFQ process that would come in the future. These are RFQ-by-RFQ conspiracies so Furukawa alleges, but this we believe, and I think the evidence demonstrates this, this is not true. This is a product of pervasive conduct that the company took as a matter of course with respect to the sale of these products no matter what RFQ, no matter what sale was involved, the

pricing of these --

THE COURT: Well, are these products the same products that were in the RFQ or are these, like whatever this wire he's holding up, something different than would go into a RFQ?

MR. WEILL: Well, first of all, the products that we are talking about, there was an affidavit that we submitted on the record and we cite it in our brief from a Mr. Sprague that talk about wire harnesses and what they are and how they interrelate with each other.

So the wire harnesses are comprised, as the -- we shot a picture up there when the -- for the Denso motion, but it comprises these wires and connectors and terminals, but the wire harness system itself also has these power boxes, relay boxes, fuse boxes, junction boxes. It is controlled by a body ECU to tell it what to do and when to do it. So these products all comprise this interrelated, functionally interrelated system.

THE COURT: Okay. But what defendant was saying is that these were custom made for this particular -- for a particular RFQ.

MR. WEILL: Well, I understand that. The argument is that these are custom made, and perhaps we are sort of getting a little ahead of ourselves but let's talk about that notion. The argument has already been from all of the

defendants that these products are unique, that you can't compare them, there's no apples to apples, there's no pear to pear, there is no possibility of doing it, yet they conspired to fix the prices of these products. So they knew -- and I will get into some of details about how they did it, but, in fact, one of the things that I think is a very useful comment from a case that Furukawa cited originally is this U.S. v. Sargent case, Sargent Electric case, from the Third Circuit, but -- if I could just find the spot.

So I looked at the case that they argued about and they claim that, oh, even in a per se case you have to create a relevant product in geographic market. I looked at the case and I said okay, I see. This is a slightly different issue because it is a double jeopardy issue and so there has to be some specificity about what is the crime that is the subject of the double jeopardy claim.

But even so, the Court, and I'm looking on page 1127 -- the citation is 785 F.2d at 1123 but the page is 1127 -- the Court says, talking about a per se violation, a Section 1 violation of the Sherman Act, it says to the extent, of course -- to some extent, of course, a horizontal agreement tends to define the relevant market for it tends to show that the parties to it are at least potential competitors. If they were not, there would be no point to such an agreement. Thus its very existence supports an

inference that it would have an effect in a relevant market.

So this notion that, Your Honor, this is a conspiracy is an impossible conspiracy because each part is fabricated uniquely, it is -- who knows? They have mechanics in each little cubicle and every part is handmade and then created for this whatever purpose it is.

But the analogy I would draw to your attention, Your Honor, is if I go to a store to buy a suit, at least for men's clothing, you know, you have limited choices, but I go to look at those choices and I say oh, I need a 44 large, 44 long I guess it is, and they say fine. So they go to the rack and they show me what's available in that size, but that doesn't mean that each of those suits for that size is unique. Sure, they were fabricated to fit a particular person as were the other suits fabricated to fit people who needed that size, but that's no different from this wire harness process. They are simply getting specifications and they are saying fine, we know how to make wire harnesses, that's why they come to us. We find out what they need, how long a wire do you need for this part? We will snip the wire. How many connectors? We will get those many connectors. Do you need a fuse box?

Obviously it is more complicated than a suit, but the sense is exactly the same, that they are creating a product that is fungibly equivalent. Otherwise they wouldn't

conspire to do it. Otherwise Furukawa wouldn't join with Sumitomo and Yazaki and Fujikura to decide I'm going to get the L Cabin Harness, you get the rear harness.

That doesn't mean that each couldn't themselves produce that harness. It is simply that they agreed that they would among themselves allocate how this business would be addressed, how they would price their submissions and say okay, I get -- I'm going to -- again, we will talk about this commercial rights -- I supplied this for the Prius prior model, this particular wire harness, so I get the right to supply here. Here is my price for this product that I'm going to submit, you submit the higher price because I'm going to get this price. If you have a product that you had for the last model, fine, I will submit the higher price for that.

But that's what those charts are that Mr. Davis put up on the board, that's exactly what they showed. They showed wire harnesses allocated among the customers -- among the suppliers that showed, okay, you know, for this one, Furukawa is number one, Sumitomo number two, Yazaki number three, and that's the order of bidding. Furukawa number one, it gets the best price -- it submits the best price. But that's how this product -- this is how this conspiracy worked and how these connect themselves together.

In terms of how this market is defined, the

co-conspirators defined it themselves. So that the notion that these are unique products is a misstatement as to how this conspiracy worked because if they were unique and only each of them could provide it, then there is no point of a conspiracy.

So let me talk a moment about the conspiracy itself. Now, again, we have cited a case, U.S. v. Smith, in the Sixth Circuit at 220 -- excuse me, 320 F.2d 647 to address this interrelationship. This has nothing to do with interrelationship of pricing, it is the interrelationship of how the products are sold. The court in U.S. v. Smith points out that what you want are three things to see how they connect together: the common goal, the nature of the scheme, and the overlapping participants. That's what connects this interrelationship.

So if I could, I would like to talk about those things for a little bit. So for that purpose, let me see, let me try pulling up Exhibit 32 to the direct purchasers' opposition brief.

Can you -- well, let me -- blow it up a little bit. It is a little hard to read, but I will say that if you blow -- can you blow it up a little bit more, Nate? Yeah, that's a little better.

So if you look at this e-mail in the middle of the page, you see it is from a [redacted], and [redacted]

is a fairly senior representative of Furukawa, and he's writing to another gentleman. He's saying -- he's writing, in fact, to General Manager [redacted], and it is talking about -- the subject is the job description of FENA-APD GM. So this is a little cryptic but I will just explain. This means Furukawa Electric North America Auto Parts Division General Manager, so we are talking about the United States.

So [redacted] is writing to [redacted], and he says I've made the first draft of the job description of the general manager of FENA-APD, Furukawa North America, with the presumption that another gentlemen, Mr. Nagata, will be stationed in Michigan, and I estimate his work there will would be 30 percent.

Can we turn to the next page, please? No, the next page of that prior exhibit. Hopefully we have that. We are talking about Exhibit 32. Okay. There you go, we found it.

So this is page 2 of Exhibit 32, Your Honor. Can we blow that box up as well, please.

So [redacted], who, by the way, has not been convicted of a crime yet but he took the Fifth Amendment at his deposition, he refused to answer any questions, but [redacted] says what the general manager's job responsibilities would be. I mean there are a number of them of course. Well, it is interesting that part of the job's responsibilities are regular and irregular exchanges with

competitors, unofficial, collecting and exchanging information, coordinating prices among competitors. That's his job. Okay.

So now we know that's how Furukawa -- that's what it expects of its managers. It expects it to go out and coordinate prices, get information from its competitors and use that information in its business.

Could we go to 31, please. Could we blow that up a bit, please? Okay.

So now [redacted] is writing to [redacted], and now this is November of 2003. The prior e-mail was also 2003. And he's writing to [redacted] and also to another person, [redacted]. So the line, again, it says the subject is LFC support tasks. LFC is Lear Furukawa Corporation. That was a joint venture between the Lear Corporation and Furukawa. Again, support tasks for Lear Furukawa. He's writing to Vice President -- Dear [redacted] and [redacted], senior people.

And [redacted] says I have written the details of the tasks I would actually like to request Nagata -- request to Nagata as far as LFC support in the attachment. Please take care in handling this as the details are what they are. Please delete this after confirming. Okay. So there's some sense that they know they are doing something wrong, and especially since it is in -- it involves the United States,

so they are saying delete the information.

Can we go to the next page, please? There we go. Can we blow up the top box, please? Okay.

So the first -- in terms of -- it says LFC support tasks. These are the minimum tasks that they are asking. And they say, number one, getting competitor price information during competitions under the table, and then he goes on to describe, okay, this is how we go about coordinating these things whenever we get a request. We talk to Sumitomo, the S manager Nagata, that's Sumitomo, and then they talk about we can't contact Y, Yazaki, directly for some particular reason, and then they go to other customers, OEMs, and talk about what they do there.

And if you could then scroll up a bit to get to the next box.

This is item number two, task number two. Everyday tasks to obtain information from competitors. And so looking at the first sentence, it says to obtain the information we want from competitors smoothly, we hold regular meetings with the division manager level of key people at competitors. So now he's describing in very specific detail not only what they do but how they do it. They could call -- as they say here, they could talk on the telephone, they could have meetings.

In fact, in this paragraph I found it interesting

they had this little quirk where -- regarding the relationship with Isuzu and Subaru, as LFC is controlling, apparently they are the lead there, or controlling Yazaki and Furukawa, they are invited to eat on LFC's tab, so Yazaki and Furukawa are -- cannot be written on the entertainment expenses. Okay. That makes sense. If you are going to conspire to fix prices, you don't put it down on your expense report that you submit. But this is just the process of how they go about it.

THE COURT: So they have a protocol for doing it?

MR. WEILL: A protocol, exactly.

So let me turn to next to Exhibit 55. This I'm just throwing in here. Now, this is in 2004. Again, this is to [redacted] from Mr. Nagata, who you heard about, but I thought this was an interesting little description of a day in the life kind of thing.

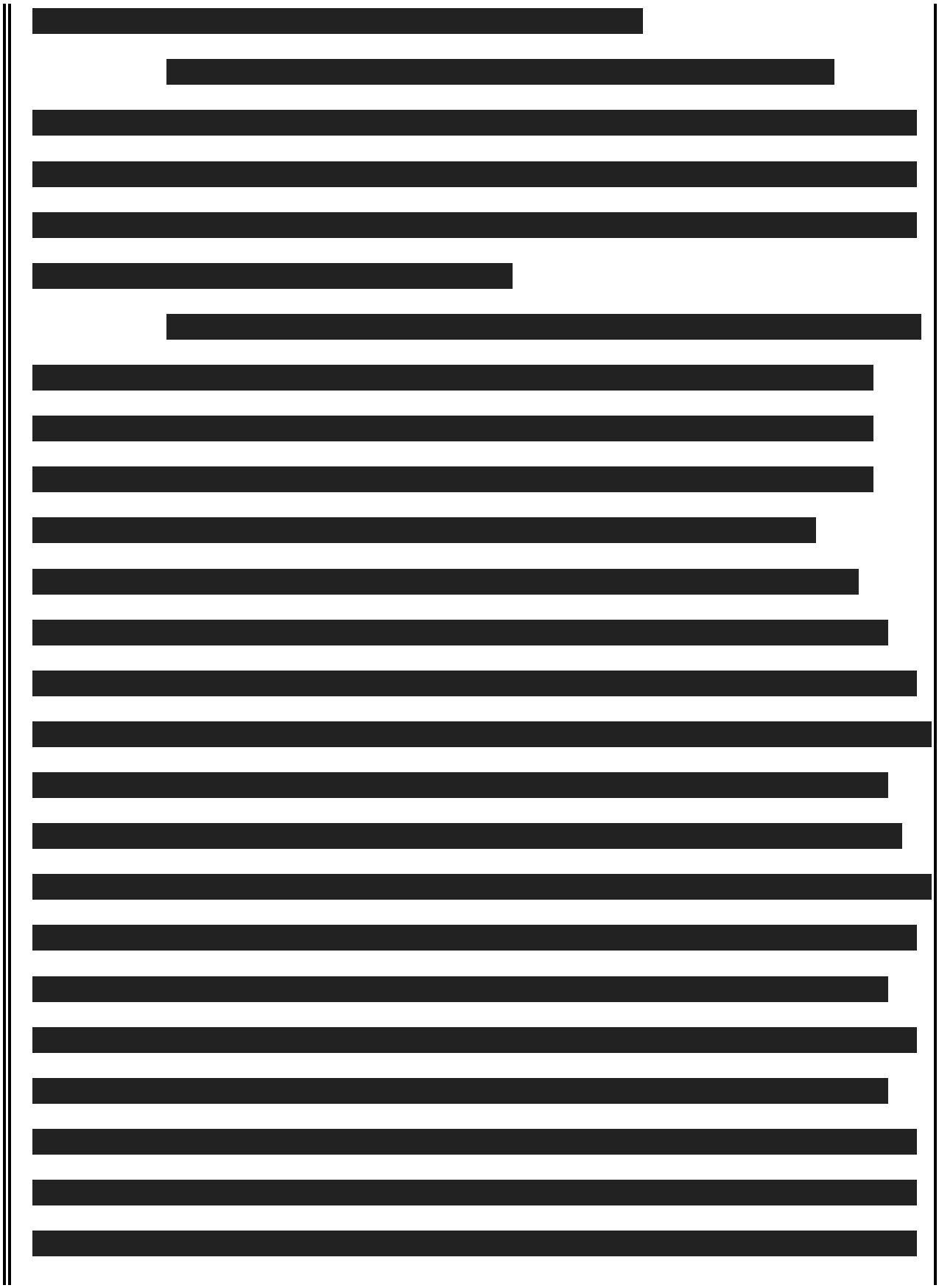
He says [redacted], I forgot to add this when we talked today. I will travel to Ohio with Manager Funo -- we talked about Mr. Funo, we will talk about Mr. Funo, he was -- pled guilty to price fixing -- to meet with Honda people to talk about this car. In the evening we will talk about Furukawa Electric North America and LFC and what they are going to do with the car.

And then he says after we have this discussion, then I will meet with the salespeople from company S,

Sumitomo, for the first time over dinner to explore the possibility of collaboration, Maruha, the collaboration for the MDX vehicle. Maruha is a Japanese term that suggests the collaboration of agreement on prices. So as matter of today's plan, that's the subject, today's plan, I'm getting this information, and then I'm going to wind up with a nice little dinner with my competitor and we are going to come to some collaboration agreement.

So that's how this pricing practice works, and it impacts the market because every instance when there is an opportunity to sell a product to these particular customers, they are getting together and they are talking about how can we collaborate on price: you give me your price, I will give you my price, who gets to bid higher, who gets to bid lower.

[redacted]



[redacted]

THE COURT: But it is -- if they are really dealing here with these things that you have shown with the OEM prices, what about these direct purchasers?

MR. WEILL: Okay. So I could go into more detail about how they allocated business among OEMs, among the OEMs, the evidence about the OEMs, so --

THE COURT: But I'm more interested right now in these here small suppliers that are the direct purchasers.

MR. WEILL: Right. So in that respect there are two things I would like to point out. The first is, I have already addressed one of them, is that the notion in the allocution that these -- this conduct affected the product -- all the products that were sold by Furukawa, it didn't limit itself to OEMs, number one.

Number two, and I've referenced this before with respect to U.S. v. Sargent but I think it bears repeating. In another Sixth Circuit -- a Sixth Circuit case, Expert Masonry v. Boone County at 440 F.3d 336, page 342, it says in a per legal -- excuse me, a per se illegal case, the market impact is inferred, the market impact is inferred.

U.S. v Sargent says when it is a per se case -- and we understand how the defendants came together and how they acted. That tells you what the relevant market is because they are either actual or potential competitors. But now

Expert Masonry says in a per se case, the market -- the market impact is inferred. So we have an impact on the -- all of the people who purchased the products that were the subject of this conspiracy.

Now, Mr. Davis speaks about how the plaintiffs have had access to all sorts of information over a long period of time to establish what they previously denied was this rather broad expansive conspiracy. And what they haven't mentioned is that the class certification process that this Court established early in the case addresses exactly the fact that they are now claiming is a failure on our part.

The summary judgment that they submit -- that they did submit in December was accompanied soon after, I think on December 23, with a request from Furukawa and Denso that the class certification process be delayed. Let's not talk about class certification, let's talk about our summary judgment motion.

Well, the class certification process has, as the Court is aware from the bearings case, a number of distinct requirements that need to be addressed. For example, did the plaintiffs buy the products that was the subject of the conspiracy; were the plaintiffs impacted; what was the measure of their damage? This is on a common basis. They don't have to prove these things, just to show that they are capable of proof at trial.

[redacted]. That's part of this class certification process that these two defendants said, Your Honor, you shouldn't trouble yourself with that at this time, let's just focus on our summary judgment motion.

But now today, as I understand it, they are coming to the Court and saying, Your Honor, the plaintiffs have not proved that there's impact or damage, and they have had all of this time to do it and they have all of these experts who are working on this material and why couldn't they present this information? Well, to me, it is a bit of a procedural game to say file summary judgment, delay the process that's going to show the impact and the damages on our direct-purchaser plaintiffs, and then claim -- put that aside and then claim they haven't done that. It -- we are not deciding the issues on their merits, we are deciding them on the basis of how can I gain an advantage by simply filing a summary judgment motion before they've put forward their requirements with respect to class certification.

It is -- I sort of thought about it as an analogy, I don't know how perfect it is, but if someone were to file a breach of contract case and they claim lost profits, the

defendants could say yeah, I breached your contract but I want summary judgment a week after we file our answer because you, plaintiff, haven't shown how you lost any profits, because there's a process that's involved in this to show exactly these facts.

And we believe, Your Honor, that if we can go forward past these summary judgment motions into the process that the Court established originally in which the Court deferred -- has deferred, that these are precisely what will be the subject of proof to the Court and to the plaintiffs.

Now at that point if Furukawa says, oh, I think that is inadequate or, you know, whatever reason they want to file summary judgment, which is normally the case when a class certification process is organized, if there are any such summary judgment motions, they come after class certification because then they decide whether the experts that provide the evidence are going to be admissible, and if they aren't admissible then they say, ah-ha, there's no proof, you've got no expert.

But it is endemic in a case like this, a per se price-fixing case, in order to demonstrate this damage amount, that you have the opportunity to go through it with a very complex process to look at reams of transactional data to show the actual impact and to go through the analytics that an expert uses to determine whether or not there is an

impact. I mean, I could say perhaps there is no impact, maybe it is a negative impact, I don't know, but that's the process the Court originally expected to see and is now on -- is deferred.

So I say, first, there is an inference there is impact based on the cases I cited and the fact that there is pervasive price fixing that affected all of the products that are the subject of this conspiracy, but also this is the part where we are entitled to go through and have our experts look at this material, examine this material, and produce these reports as part of the class certification process.

THE COURT: All right.

MR. WEILL: Thank you, Your Honor.

THE COURT: Thank you. Reply briefly.

MR. DAVIS: Thank you, Your Honor. I will be brief.

There were two spoiler alerts in Mr. Weill's presentation to highlight my rebuttal here. One is apparently we wear the same size suit, 44L. Despite my extra pounds and inches apparently we wear the same suit size.

The other thing, Your Honor, was that you really asked the key question here and you never got an answer. That key question was, and I wrote it down, are these products the same products that were part of the RFQs that were sold to these OEMs? That was Your Honor's question.

There was never an answer. There was never an answer. You never saw on the screen documents that shows the products that these plaintiffs bought are the same products, or even if they are related in some way, functionally, price-wise, otherwise, if they are at all related, there is nothing in this record to answer that question. That basis alone is fatal to the plaintiffs' position on this motion, absolutely fatal.

There is no evidence that the terminals and connectors that they bought are similar, dissimilar, otherwise than the terminals and connectors that were part of wire harnesses that were sold to the OEMs. [redacted].

The other products similarly, there is nothing in this record from which the Court can conclude that they are functionally related in any way, shape or form to the products that are sold to the OEMs, much less that their prices are somewhat related -- somehow related, just no evidence whatsoever. That's really the key point, Your Honor.

THE COURT: Can there be an inference, if they had a terminal that they use in their wire harness or it is one

of the products for the wire harness, can there be an inference if that's price fixed, that then they are going to keep that price for these independent terminals that might go in boats instead of automobiles?

MR. DAVIS: Sure. There is a factual predicate first that the products -- these terminals are functionally similar to the terminals that were part of the OEM -- the sales to the OEMs. That's the factual predicate which the plaintiffs have not established.

But assuming that were the case, the answer is no, that's not a reasonable inference. And the reason why it is not a reasonable inference, Your Honor, is we are not talking about commodity-type products here, we are not talking about Furukawa sold salt to the OEMs and then turned around and sold salt to these DPPs. If that's the plaintiffs' argument, it just can't be made here. First of all, there is no evidence that these products are functionally related at all, but moreover, there is evidence in the record that shows, first of all, the products were not the same.

[redacted]

did buy, which one of these billions in the constellation of terminals and connectors out there they did buy, much less whether it was related to the products that may have -- may or may not have been part of any OEM sale. There is no evidence that the products were the same.

Secondly, there is no evidence that the competition was the same. These custom-made wire harnesses, as Your Honor might recall, the competitors weren't just anybody; they were selected by the OEMs. They said we want Sumitomo, Yazaki, Furukawa to bid on this, we are not interested in anybody else, you guys go out and bid on this wire harness. That determines who the competitors are for the sales to the OEMs.

[redacted]. So the competitive landscape with respect to these products that the DPPs did buy was completely different than the competitive landscape for these custom-made products that took years to develop and cost hundreds of dollars each,

completely different market, completely different market.

Finally, the method of purchase was completely different with respect to the products that these plaintiffs bought and the method of purchase with respect to the sales of the OEMs. And we talked about this before and I won't [redacted].

So the products are not the same, the competitors are not the same, and the method and the process of the sale is not the same. Therefore, it is completely inappropriate, and this gets back to your original question, Your Honor, to make any inference that there's any connection between the pricing of the $100 or multiple hundred dollar wire harnesses and the pennies connectors or even the smaller harness that apparently one of the DPPs may have bought from another defendant, not Furukawa. So there is nothing in this record to show, first of all, that these products are related in function, form or fashion to the products that were sold to the OEMs, and there certainly is no way a reasonable inference can be made that there is a relationship of pricing.

And, Your Honor, I want to point out because Mr. Weill pointed out the case of U.S. v. Hughes and other

cases that they cited in their briefs with respect to the market impact is inferred I think is the phrase that Mr. Weill used.

Your Honor, all of these cases are easily distinguishable, whether you are talking about Vitamins or you're talking about Polyurethane or talking about the CRT case or talking about the Hughes case, because in each of those cases there was plenty of evidence of multiple conspiracies.

The only question was whether a particular defendant, or defendants in some of the cases, could be tied to those conspiracies that are already existing. There was no issue in those cases whether or not the plaintiffs had been impacted by those conspiracies.

Here the plaintiffs have not shown that there was a conspiracy as to many of those wire harness products that they did purchase, they are different products. There is no evidence of conspiracy with respect to those products, so those cases are all distinguishable on that basis.

Polyurethane Foam in particular is very telling in that in that case the court relied heavily on the DPPs that produced evidence that showed the interrelationship of the pricing of the products. Again, there is no evidence here of the interrelationship of the pricing of the products.

Secondly, in Polyurethane Foam the plaintiffs in

that case came up with declarations from cooperating defendants who had settled with them already to tie that remaining defendant to a conspiracy that had already been proven. Very distinguishable from this case, Your Honor; eight settling defendant families and no declaration.

Finally, in Polyurethane Foam, the plaintiffs in that case produced an expert who came forward and talked about the interrelationship of the pricing between the products that were at issue and the second related conspiracy and the original conspiracy. Here, Your Honor, there is no such evidence. So the cases that the plaintiffs cite are simply not applicable at all.

And to finish up, Your Honor, to get back to the suit analogy, this is as if there were some known conspiracy out there with respect to a custom-designed suit -- unfortunately I don't wear custom-designed suits so I can't show you what one looks like -- but it is as if these plaintiffs bought buttons and they are saying, well, the conspiracy on the suits affected the price I paid for these buttons without coming forward with any evidence that that was the case, any evidence.

And you saw the exhibits that they did rely on here today, Your Honor. Again, even those exhibits, Exhibit 34 I think with respect to some of the dialog back and forth amongst Furukawa employees, talked about Honda. The whole of

the conduct in this case goes back to the OEMs, all of the conduct. We don't even know what the plaintiffs bought, much less whether or not it is related in function or, more importantly, in price to the products that were subject to the conspiracy.

THE COURT: Okay.

MR. DAVIS: Thank you.

THE COURT: Thank you. The Court will issue an opinion on this. We have two other motions and we will do them after lunch. Let's resume at 1:30. 1:30. Thank you.

MR. WILLIAMS: Excuse me, Your Honor. One thing very quickly. I will try to reach counsel for the OEMs to make sure they are here at 1:20 because I think that was set for 2:00.

THE COURT: Was it set for 2:00?

MR. WILLIAMS: I have contact information so I will do everything I can to get him here at 1:30 if I can.

THE LAW CLERK: It said we will start early on the agenda.

THE COURT: Did they get the agenda? We said we could start early on the agenda but I'm not sure the OEMs got the agenda.

MR. WILLIAMS: He understood it was a possibility, so I will do my best to reach him over the break.

THE COURT: We won't start until obviously --

MR. CHERRY: Your Honor, can I just address one thing because I won't be here this afternoon, and Mr. Cuneo is in agreement.

THE COURT: Yes.

MR. CHERRY: The ADPs submitted a motion about allocation of the settlement proceeds, and we have had some discussions about some edits to that motion and the proposed order. I think we are going to be in agreement on it, but could Your Honor hold off ruling on that until they submit a revised version?

MR. CUNEO: A revised order.

THE COURT: Is that correct?

MR. CUNEO: Yes.

THE COURT: Okay. Molly, just make a note of that. Okay. Will do.

MR. CHERRY: Thank you.

THE COURT: Thank you.

THE LAW CLERK: All rise. Court is in recess.

(Court recessed at 12:21 p.m.)

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(Court reconvened at 1:37 p.m.; Court, Counsel and all parties present.)

THE LAW CLERK: All rise. Court is again in session.

THE COURT: Good afternoon.

THE ATTORNEYS: (Collectively) Good afternoon.

THE COURT: All right. We have two motions. Let's take GM's first. Who is here? Okay.

MR. WOLFSON: Good afternoon, Your Honor.

THE COURT: Good afternoon. May I have your appearances, please?

MR. WOLFSON: Yes. Adam Wolfson, from Quinn Emanuel, on behalf of General Motors.

So, Your Honor, GM's motion is fairly discrete, and in order for me to explain it or provide why GM is objecting to the Special Master's orders, I would just like to set the table a little bit about where we are and really what this is about.

GM so far in discussions with the parties over the subpoena has been able to reach compromises with respect to most of everything that they requested. We are producing a substantial amount of purchase data to the extent that is available from our system; things like contract pricing, amounts of parts, the types of information that show our purchases to the extent that we can collect it. We are producing cost data. These are things called uncosted bills of material, which is the best we could get them regarding our costs, but they provide the bills and materials for the cars, not specifically broken done by parts but they do provide the overall costs for the parts -- for the cars.

We are providing pricing and sales data, payment processing transaction data. So the transactions that GM undertook for its cars, we are providing them to the extent it is available. So we have purchase, cost and sales data.

What the dispute is about is the so-called pricing methodology documents, and there are two types: there's something called a pricing review deck and a profitability summary review, which they were described in general in the deposition of Christopher Hatto, who is GM's North America CFO. And what the plaintiffs are saying is that they need those documents in order to establish passthrough, in other words, the amount of overcharges that were passed through from GM's overcharged purchases on down to the indirect purchasers.

The problem though is that the pricing methodology, the specifics of how GM prices its cars is extraordinarily confidential. This has been referred to as the crown jewels multiple times throughout the saga of the subpoena. And really there is actually no dispute that they are -- that the pricing methodology is highly, highly confidential. The serving parties have effectively conceded that. Special Master conceded it on December 9th at the hearing.

And the idea that this sort of information could get out to a large number or even just a substantial number of people is -- and if it were to become public or available

to GM's competitors, to its suppliers, to its customers, this has -- it would very much harm GM's competitive position in the market.

THE COURT: This is specifically how GM prices its cars?

MR. WOLFSON: Yes, the factors it uses, the methods it takes to calculate certain market factors. And what we have submitted on multiple occasions is a description of the general approach that GM takes to pricing, but it is the specifics of -- it is the nuts and bolts of how that happens that we are objecting to producing because frankly what the parties need to do is show absolute need.

The process for third parties who are asked to produce trade secrets, it is a three-step process. The first is that the subpoenaed party needs to say or explain how the requested information is a trade secret. And although I could get into the details of what evidence we have submitted, again, this is something that doesn't seem to actually be all that contested.

So then we go to the second step, which is that the subpoenaing parties have to demonstrate what is called absolute need, and what that means is that the information sought is not available from other sources. And if the information is available from other sources, then that -- it greatly diminishes the need argument. This is discussed a

bit in the Spartanburg case that we cited in our briefing as well as the Universal Delaware case that we cited. We think those are excellent examples of how this analysis proceeds and where they reach the right result where the third party, subject to Rule 45 subpoena, showed to the Court that there was not an absolute need and therefore the third party should be protected from having to make the production.

So why did I set the table at the beginning of my argument? Because the need here supposedly is to show passthrough. And when you look at passthrough, it is really an empirical analysis. Were there heightened costs, were there purchases of parts with those heightened costs, were those then passed through to the indirect purchasers? And what they have is the data that will show that empirically. If there were higher costs, then they are going to have that in the data that GM is producing. Will -- was it then passed through downstream to the indirect purchasers? They have the sales data, they are able to provide that data to their economists, we are in the process of collecting and producing it, and then they can show passthrough.

The idea that there are separate materials that review or reflect a thought process or the reasons why certain price changes might have been made, what we know from the case law is that's not a showing of absolute need if you have other less burdensome approaches in discovery, and GM

has effectively given them everything that they need for this. So our view --

THE COURT: Well, you say there is no passthrough?

MR. WOLFSON: Your Honor, I think that what we have said is that GM's approach is not based on incremental changes in the cost of specific parts, it is more of a market-base approach. Whether or not that means there's no passthrough or not, I think that's more of an economic issue for the experts. It is more that -- what we -- our argument here is just we have told you how we do it generally, we are giving you the data, we are giving you the information that you need to be able to sort through and analyze that data, and therefore we are giving you quite a lot.

What you don't need to then get into are the detailed descriptions of how we -- what variables we apply to specific market factors, how we assess whatever goes into it. Frankly, I can't say that I can even get into the details of it because it is so highly, highly restricted. At GM, out of the thousands upon -- or tens of thousands of people, I believe the evidence was that frankly just a few dozen at most have access to these types of documents, and that's intentional because they are so, so highly confidential.

With respect to that general approach, the evidence that we have offered of it, the one point that is worth noting is we have been dealing with the subpoena now for over

a year and a half, closer to two years at this point than anything else. The automobile industry is one of the maturest industries in the United States. You have I want to say hundreds of analysts analyzing the industry, and we have never seen any evidence calling into question GM's own description of how it prices its cars. That's telling we think because it shows that what we are telling the parties is true.

And they have questioned the declarations, they have said that there might be certain incentives underlying why GM is protecting itself or why it is making certain statements. But if there was any reason to doubt what discovery GM has already provided and what discovery it will provide, then we think at this point it was the serving party's burden to put that into the Court at some point in this process but we don't think that they have.

The protective order also is really not an issue here. Protective orders are necessary in many large cases such as this, and we are not saying that any parties have broken the protective order strictures or anything like that. What this is about is a Rule 45 third-party subpoena, and the case law has developed to protect third parties from producing trade secrets regardless of protective orders because we don't want to have to even produce that sort of information as a third party if we are not actually in the

lawsuit.

THE COURT: Okay. Let's say you have to produce it.

MR. WOLFSON: Yes.

THE COURT: I just want to get to the protective order because I think that's the easiest. Right now there are many strictures in that protective order to protect it. One of the issues is that it would be at one of I think six attorneys' offices or defendants' offices.

MR. WOLFSON: Uh-huh.

THE COURT: And I think GM has a problem with that, some of the -- and some of the parties have a problem with that because if one person settles, it might take it out of -- I don't know, they would have to move it or do something with it.

And my question to you is that material is available at GM, it has to be under the Master's order in a non-Internet standalone computer. Would the objection about being at one office, could that be resolved by being at GM, for instance? Is there a spot where GM might be the holder of the materials?

MR. WOLFSON: I think the answer to that one at least is yes, Your Honor. In fact, the whole proposal to have this on a non-Internet connected computer under strict guidelines was actually mine at the earlier hearing, and I

believe the Special Master -- I forget what his exact words were, but his initial reaction was that actually makes a lot of sense. There were objections, there was argument on it, and he did subsequently revise it, but I do believe that that would be better.

The way that this is handled in similar types of cases where there is highly, highly confidential information, for example, source code cases, they will have this setup where the computer is controlled by the party producing the information and you essentially need to check in so there is a record of who accesses it, and then if anyone prints out any copies of it or otherwise makes a version that they can then take for evidentiary purposes, that is also logged, so we have a control and we know who is taking the materials away.

THE COURT: Okay. The other part of that protective order you just mentioned were the copies.

MR. WOLFSON: Uh-huh.

THE COURT: I'm not quite sure about -- I can't remember now the wording, but reasonable need or relevance or something like that.

MR. WOLFSON: Uh-huh.

THE COURT: But I would assume there would be a, quote/unquote, reasonable need by different experts, say, and so they may have to copy parts of that. Are there -- in that

protective order, are there any protections outside of copying the whole thing if you show a particular need?

MR. WOLFSON: Well, to answer -- well, the premise of the question, Your Honor, I believe the wording is that it would be reasonably necessary --

THE COURT: Reasonably necessary.

MR. WOLFSON: -- to make copies, things like that. And unfortunately we think that that is -- it's an exception that swallows the rule because we are all lawyers and there are many excellent lawyers in this case who will be able to come up with very good arguments for why things are reasonably necessary.

THE COURT: Well, that's why I'm questioning it. I couldn't see the limits on reasonably necessary.

MR. WOLFSON: That is -- it is one of our objections to the order, Your Honor. For our purposes, we think that it is more workable I believe if experts, economic experts, because I would like to address the type of experts that have access to the material, if they were able to make copies, that I think would be -- if we are ordered to produce this information, that would be more acceptable to us because it is more protected.

One of the issues that -- I believe the Special Master himself noted, well, I don't want a hundred attorneys being able to look at this. And in this case we have -- in

this MDL I think we have something like 88 law firms, not attorneys, law firms that have been -- at some point have filed some sort of notice of appearance or are involved in the over 40 sub-dockets at this point.

THE COURT: Forty-two.

MR. WOLFSON: Forty-two. I had 41 in my notes so obviously I'm behind the times.

The reasonably necessary aspect to it, I do believe that we would need higher protection from that, and that is one of our objections. But then the types of experts --

THE COURT: So your resolution to that particular problem is to have only the experts, and you are going to get into types, but only the experts have copies?

MR. WOLFSON: I believe so because in the end, really what this is is it is an economic question, is there passthrough or not. And by looking at these materials, can we show whether or not there is passthrough? If an economic expert is looking at this and it is looking at these materials and is looking for support for their economic opinion, being able to look at the pricing methodology used I guess theoretically could be used to make their points one way or another but --

THE COURT: But one would assume they would have to analyze this material if there is this need, and so they would have to have it on their machines I guess to run

whatever programs they may run, so they would also have to have standalone -- sign as to standalone equipment, et cetera.

MR. WOLFSON: Well, this is actually an instance where the materials in question are presentations. I don't know if they are PowerPoints or some other type of document, but they are -- this is not data where --

THE COURT: So it is not economic -- I mean it is not numbers?

MR. WOLFSON: No, no, it is not like spreadsheets or CSP files or the other types of database entry type files that economists regularly use. This is more about internal presentations that were made among GM executives about, among other things, not just pricing but pricing issues.

So if this was in a centralized location where GM controlled it, whether a law firm of its choice or at GM, one of its buildings here in Detroit, if an expert wanted to make a copy, they then could and -- but it would be controlled. So that's the gist of the proposal, that if we are ordered to produce the documents, that we would prefer.

And with respect to the experts, under the Special Master's order what you have is industry experts can take a look at these documents, not just economic experts. And for us, that effectively eviscerates the protections because what you have is people who work in the automobile industry who

they can't unlearn the facts that they see, they -- once it is there, you know, it is there. So one of our initial objections and proposals as part of the protective order process was that only economic experts be permitted access to these files to the extent that they are ordered to be produced, and that other type of experts, particularly industry experts, are not permitted to review them because otherwise then the price methodology then gets out there.

THE COURT: It would seem, would you not think as an attorney, that when you are looking for an expert, the first thing you are going to look for is an industry economic expert, somebody who is familiar with what is going on?

MR. WOLFSON: Yes, but I think that's -- there is a fundamental difference between an economist who is offering damages opinions, class certification opinions, other economic opinions, that they have familiarity with the auto industry versus somebody that is coming in to offer essentially expert opinion on how that industry works. In other words, in these cases what you often have is an economist who their specialty is econometrics or other types of analyses that allows them to take extraordinarily large amount of data and find either the trends or find the small little bits of pieces of economic evidence showing that there were overcharges on a grand scale.

What I'm talking about more are industry experts

where you -- they are the sort of experts that we have at trial to teach the jury a little bit about how the industry works or to explain how what was being done was outside of industry norms. More -- they are not being offered to show a hardcore economic analysis of the automobile industry but rather to describe how it works for whatever purpose that the parties offer.

THE COURT: Well, would that put GM then -- the guard or the monitor of the experts that these parties choose, would GM have the right to veto these experts?

MR. WOLFSON: The way I've done it in other cases and the way I've seen it done in other cases is that there is an objection period where an expert is disclosed to the other party, that this is the expert who will want to take a look at your trade secret highly-confidential information, and then the party has a certain number of days, often a week, but a certain amount of days to raise any objections, whether it is conflict issues or they work for a competitor issues, things like that, and then if there is that sort of objection, then it would be submitted as necessary to the Court. That's the way it has worked -- or I have seen one mechanism for making it work in other cases. And it can't be unreasonably withheld and can be specifically put into the protections that it cannot be unreasonably withheld.

THE COURT: I'm curious, have you disclosed this

information in other cases under protective orders?

MR. WOLFSON: This pricing methodology? I actually don't know, Your Honor.

THE COURT: I'm just wondering how that order worked.

MR. WOLFSON: Sure. I can check, and if so, I would suspect that it is in cases where GM was directly a party if it happened, but I can check.

THE COURT: The only ones that I'm familiar with it has been GM was a party and it was a product that they were protecting of some type, but okay, all right.

With that, let's go now to the basic question, the need for this.

MR. WOLFSON: Yes, Your Honor. Well, I think -- sorry, I'm just making a note so I don't forget Your Honor's request.

The basic need is what's -- I think what I mentioned before is that it is a heavy showing that needs to happen here, is that they -- once we have established this is trade secret, they need to show, this is the quote from the case law, absolute need, and the absolute need here we think is just not present. They have the tools to assess passthrough and are getting them, and -- but what they want is more, and what they want is essentially something describing thought processes but not the actual execution on

GM's pricing, not the actual sales which they are getting, not the actual costs that were taken into account for the end -- well, not taken into account for the end price but taken into account for GM's accounting purposes, which we are producing, not the actual purchasing data, which we are producing, but rather materials that just describe how GM is going through the preproduction process and then afterwards its profitability and how the sales for the different cars have occurred.

And since we have submitted briefing on this, I mean, just facts that largely -- they show why ordering us to produce this information now may have -- well, it may put the information out there for no purpose. Originally when we were going through all of this, the AVRP and the bearings cases, they were furthest along and they were the ones where we were asked to focus our inquiries and our collections. We have now been told that plaintiffs largely don't want that information any more because they are -- well, I assume because they have either settled the cases or are mostly at that point.

We have a number of different cases coming down the pike that aren't even as far along as the AVRP and the bearings case were, and I understand that Your Honor has been having discussions with the parties about trying to resolve those. So if those are resolved and they get to the

resolution point before any real discovery happens, if we are ordered to produce this in the short term, it will be effectively putting it out into the ether for cases that don't actually need it.

So our view is that the parties have to show absolute need, it is just part of the case law. They haven't. We have shown the extreme harm that would occur to us if these -- if this information were to get out there. Therefore we have satisfied our burden under the case law but they have not, and that's why we object to the Special Master's order. He admitted at the December 9th hearing that he was right on the edge on this, and we think he erred, not egregiously so, but he erred in failing to take into account their failure to actually satisfy their burden.

THE COURT: Okay.

MR. WOLFSON: Thank you, Your Honor.

MR. WILLIAMS: Good afternoon, Your Honor. Steve Williams for the end payors and for the serving parties.

THE COURT: Let's start for you with this absolute need.

MR. WILLIAMS: Thank you. And I would like to because the briefing kept using different terms which was substantial need, which is certainly a lesser standard than absolute need.

THE COURT: Right.

MR. WILLIAMS: And I think what I would say in that regard is from the time that this Court decided the first motion to dismiss, the argument I have seen in every subsequent briefing discussion is that the indirect purchasers, the auto dealers and the end payors face a tremendous hurdle in this case, as the Court has recognized, because they have to show that price increases, if any, were passed through by the OEMs down the chain of distribution to the purchasers. That was identified at the earliest point once the pleadings were settled as perhaps the most critical issue for us in this case, and the discovery we are talking about here is tied directly to that issue.

We don't, nor do I believe Special Master Esshaki in any way, diminished that this is important information to General Motors and is confidential. No one is disputing that, nor are we disputing that General Motors has provided a lot of information, as has all the other OEMs who were subject to the first round, but only General Motors, and not the other OEMs, says they won't turn this information over, the others all will. And the reason there is a need is because --

THE COURT: What's the nature of the others? Tell me again, the manufacturers, the OEMs.

MR. WILLIAMS: Which ones or --

THE COURT: Which ones?

MR. WILLIAMS: Those would be, if my memory serves, Toyota, Honda, Nissan, Fiat Chrysler and Fuji Heavy Industries, which is Subaru.

THE COURT: So we had six I think at the beginning.

MR. WILLIAMS: We did those six, I think that's all of them.

And specifically, counsel is absolutely right, the analysis is empirical. And he's absolutely right, they did agree to give us a lot of information, but they didn't agree to give us everything that we had sought because if we had all costs --

THE COURT: Let me ask you this too though. When we talk about the five others, do they price the same way or is there something unique about GM's that -- if you know. I don't know that you know that yet.

MR. WILLIAMS: Well, it is hard to say, but, Your Honor, I think that goes to the need issue, which is they are all basically doing the same thing. I mean they are buying parts from the defendants and they are building a car and they are selling it to consumers. There might be differences in how they do it, but as counsel said, it is a mature industry. It would seem that -- in fact, even as GM says in what it has disclosed, it looks at the market, it looks at what other automakers are doing, it looks at prices out

there. So I would imagine that there are some similarities, but -- and to me I think this gets to what the issue is -- because General Motors in particular has put out some information, you know, their declaration saying a cost increase on a particular part wouldn't cause necessarily a price increase for the finished product, this is now an argument we hear from the defendants every time we see them, which is critical to that core issue that I mentioned about is the cost passed through or not, that is really only going to be answered by reference to the documents that we are talking about here.

And had GM been able to or agreed to produce all of the cost data we sought, which it didn't, and all the pricing data that we sought, which it didn't, we might be able to do it differently, but we didn't obtain that. And I think given that deficiency and given the statements they have already put out there that would suggest in GM's view that price increases or cost increases don't change the price --

THE COURT: Well, what cost data didn't you get? He talks about giving you a lot of information, and I assume that's true, so what didn't you get?

MR. WILLIAMS: It is a lot, but it is in a more aggregated sense, it is not on a part by part sense, which is in an ideal world you have every cost input to the vehicle so that you can model all of those costs and then how they

relate to the prices and how they relate to cost changes over time so you can show the trends or impact in this pricing.

So because they have now put this statement out there and that's in the record, if we go through class certification, you will see their argument no doubt on the first page of the defendants' brief. The failure of plaintiffs' motion is it doesn't acknowledge that General Motors has said cost increases don't get passed through. So that issue has now been put out there and we have had no opportunity to test it.

And counsel had argued that, well, the serving parties have not put anything before you to rebut what we have said about that, but in our view, that's because we don't have access to it. They know what that information is and they have made certain affirmative statements. We have had no ability to test that. The depositions taken to date were only for the purpose of knowing what documents they had and where they are kept and how much would it cost to produce them. We didn't have an opportunity to cross-examine on this subject, and to us --

THE COURT: So, again, going back to this data, this cost and this pricing data, are you saying that you want what you are seeking now in place of the cost in pricing data by part, or would you suffice with the cost and pricing data by part?

MR. WILLIAMS: I think given the time we've taken, how long we have gone to get to the point we are at now, it is too late for the purposes of these cases to revert back to something else. We have litigated it. I commend counsel because throughout the entire process they met in good faith and we met as much as we could where agreements could be reached, and with the assistance of the Special Master, he pushed us to make additional compromises. We did everything we could. I don't think we can go back and redo all of that at this point. I think that it is too late in the process and would cause too much havoc to the schedule in these cases to go back and do that now.

Your Honor's question though, it reminded me of one point I did want to make to respond to some of the arguments that counsel made near the end about how he made a reference to AVRP and bearings and those cases are settled and we now don't have to produce that. I just want to note, that has nothing to do with what we are talking about now. What we are talking about now is the pricing of the finished vehicle, and all that has been taken off the table because of AVRP and bearings is the upstream side, which is the part acquisitions from the defendants to the automakers, so that argument doesn't really address what we are talking about here.

And I want to note as well or come back to this suggestion of looking at this, at GM. Special Master Esshaki

when he first heard it did say that makes sense. But when you heard what the parties who were going to have to use the information thought about the extreme difficulties we would face if we had to take turns from flying around the country to make an appointment at General Motors to look at something on their computer for purposes of one of the, if not the most, critical contested issue in the indirect purchaser cases, it would be completely infeasible for us to do that. And there is a distinction.

So there is the transactional, the data, those types of things that go to the experts. That's not what we, the attorneys, need to see as much. But these documents which go to this contested issue, those are things the attorneys need the opportunity to look at and study and understand because this case could turn on those documents and those facts, and doing that at General Motors' office is just not going to be a feasible way for us to do this.

And as we have cited to the Court in our papers, from this district, the Nucor case, that recognizes total prohibitions on discovery like this are generally inappropriate, they rarely happen. And what you heard referred to were source code cases. This is not source code, it is not. It is not source code, it is not the recipe to Coke, it is none of those things.

And further, those source code cases you have been

referred to, as we pointed out in our papers, those were agreements by the parties. Those were not decisions by courts on disputed motions. The parties simply agreed to it in those cases.

For many reasons, those are not analogous to the situation here.

And I would add a few things. One, this issue in indirect purchaser cases is central. And the argument made in class certification motions, one of the predominate arguments is your analysis, plaintiff, does not take into account how retailers or how manufacturers adjust their pricing in reaction to cost changes. Cost changes, no economist is going to dispute that cost changes have an effect on prices, but the argument then is, well, how? Is a manufacturer going to reduce their price from 29.99 to 19.99 based upon a cost increase or not? Is it going to look at what its competitors are doing? How is it going to make that decision? Plaintiffs, you have not shown that, in fact, those cost changes had an impact on the prices they charged. This is something that we are going to be called upon to show to you, and this is evidence that is directly on that point. There's certainly a substantial need --

THE COURT: So you need it before class cert?

MR. WILLIAMS: This is going to be certainly critical for class certification.

THE COURT: You need it before class cert?

MR. WILLIAMS: I --

THE COURT: I mean as we go through the parts?

MR. WILLIAMS: Well, I guess we look at it two ways. We will need it for class certification in any case. If a class is certified, we will need it then when we are putting the case in at trial. In terms of needing it before class cert, I guess it is a timing issue. We have been working on this part of the case --

THE COURT: You haven't needed it so far?

MR. WILLIAMS: We have wanted it. We haven't --

THE COURT: I know you want it.

MR. WILLIAMS: -- we haven't been able to get it. Certainly this is one of the areas that the experts working for us most want, are most waiting on.

And I'm thinking about the bridge that was on the screen before and the part of the bridge that's missing for us. We have more or less completed discovery in several cases on the upstream side. What happens from the defendants to the OEMs, right now we have that gap in the bridge between what happens from the OEMs to the downstream side. That's the part of this case that after five years has not been filled in for us. That can only be answered with the OEM discovery.

THE COURT: What about this -- the discovery being

only to the experts and what about the economic versus industry experts?

MR. WILLIAMS: So I think our view on that, I put it in two buckets. The transactional, the data, for our purposes, we don't -- the lawyers don't need to see that. That's what the economists and econometricians works with. They model and they do their analyses and they report to us on what it shows.

These documents, as counsel mentioned, are more in the form of PowerPoints, declarations, they are more narrative. I don't know how I would describe it best because I haven't seen them, but these are not those types of documents.

THE COURT: They are not transactional?

MR. WILLIAMS: They are not transactional, they are not data. And in that sense, I'm familiar with the principle that has been stated, that in some cases a party gets or a non-party gets notice of who the expert is that you want to use. We routinely prefer not to do that because it, one, requires a pre-disclosure of an expert, and, two, it gives someone else a veto power over something. It -- these are people who are not in the industry, they just -- they have studied the industry.

Those are experts we use in cases like this, it's true. We routinely use an expert who, counsel said it

correctly, one does economics and econometrics. One studies the industry to explain why would a conspiracy be effective, why was it possible in this industry, how it would affect the actions of the actors in this industry, the auto dealers and the auto makers. So that is the type of expert we would want to have.

And given the extraordinarily high level of protections that Master Esshaki put in above what our protective order already provides in this case, we think those protections are ample.

And I think that one of the things that is critical to this is the harm that has to be shown here. As I read the papers, what it really looks like to me is the harm they are more concerned with isn't what's actually permitted; it's, well, what if it gets to someone else, what if it gets to a competitor? Well, no competitors get this, period, none of the competitors from General Motors get access to this information. But the parties would have access to it and the parties in this case are essentially trying to prove this one issue. If there were cost increases from defendants to the OEMs, did they make it to the indirect purchasers?

Special Master Esshaki granted this discovery because he said this is an enormously important case that has an economic impact potentially to millions of Americans and this is the fundamental issue in the case, and I believe he

was correct in that regard.

The defendants certainly throughout this case have turned over extraordinary amounts of information that is incredibly confidential to them, proprietary to them, that they would prefer not to turn over, they are protected by the protective order. The auto dealers have done the same. General Motors would enjoy higher protections than the parties. I've never encountered this level of protection for information in any case I have been in.

And I mentioned the other indirect purchaser cases where the bases by which retailers and manufacturers make decisions on prices are routinely at issue. It is not typically even disputed. It's simply provided in discovery because it is a central issue, as it is here.

I know I'm repeating myself, but it is really the core issue for the indirect purchasers in this case is how did price changes affect what the prices were to the consumers. And General Motors through the declarations it's put in suggesting that it has no effect has made it very more important for us to be able to rebut that because right now that puts a thumb on the scales in favor of the defendants. We don't have the ability to respond to it because -- or I should say at this point we don't because if General Motors' objection were to be sustained, that would be taken away from us.

The most important, the most direct way to respond to that assertion, which will be set forth to us time and again, would be through discovery to understand that, to analyze it, and to be able to interpret whether for some reason General Motors, unlike every other manufacturer, is immune to cost changes when it decides to sell its products for.

THE COURT: Okay. Anything else?

MR. WILLIAMS: No, Your Honor. I'm sure there was, but they are not coming to mind at this time.

I will note that the remaining -- or that the next motion has some overlap to this one so some of these issues will be addressed there in terms of access and scope. But I really wanted to focus on the need and why we think that there is -- I would say there is an absolute need. If that's not the standard, there is certainly a substantial need for this information here.

THE COURT: By the way, what is the anticipated volume of information? Is there some burden of production in terms of volume?

MR. WILLIAMS: To my knowledge, and counsel will correct me if I'm wrong, on what we are calling the -- I should -- what General Motors has called the crown jewels, and we have all used that terminology, I understand that's a relatively small amount. They certainly believe it is very

sensitive but it is not an enormous amount of data. Counsel will correct me if I'm wrong.

THE COURT: Okay. Thank you.

MR. WILLIAMS: Thank you.

MS. SMEDLEY: Good afternoon, Your Honor. Angela Smedley, counsel for the Panasonic defendants. I'm here today representing defendants. We also signed on to the serving parties' opposition to GM's objection.

And just a few things. I wanted to touch on the very critical issue of passthrough as both counsel before me have, but just as plaintiffs need to demonstrate that the alleged overcharges were passed through to them, we need to have the opportunity to demonstrate that there is an absence of that passthrough. And while --

THE COURT: You have an affidavit of --

MS. SMEDLEY: While the recent statements by the OEMs are certainly relevant to that and, you know, we are happy that they have provided those, it is really the underlying data that we need to be able to give our experts so that we can provide it to you and show that there is support for those statements that there is an absence of passthrough from a contemporaneous source. So the data and the pricing methodology documents are very central to this case. Specifically, the qualitative documents that Mr. Wolfson was talking about are important because we need

to know if -- from the numbers, if we can see an increase in price just from the numbers, we don't know necessarily what that is due to. And if we are able to actually take a look at the qualitative ways in which GM and the OEMs make those decisions, you know, GM indicated that their methodology is based on market factors and profitability considerations, so if there is an increase, is it due to a profitability consideration? And the spreadsheets and the other documentation of GM's methodology when they are pricing their vehicles is what's going to enable us to make those -- make arguments about those issues. So in terms of defending our clients in these cases, having access to this sort of information is really critical for us.

In terms of Mr. Wolfson's suggestion that all of these materials be located in one place at GM, that poses some significant obstacles for defendants partly because there are so many defendants who have been dragged into these cases. We are all over the country. We would be facing enormous burdens of time, travel, costs.

There are logistical issues that we would need to address with GM on a constant basis I think. When people wanted to get access to the documents, we would need somebody to physically be there to let us in and give us access to the documents. There is what seems maybe, you know, kind of a silly thing to focus on, but if this -- if this information

is located in one standalone computer at GM, we are going to be competing with each other. And we are all in different cases, we all represent different clients. We will be competing with plaintiffs to literally stand in front of this computer and look at this information, which just doesn't seem like a practical way to litigate.

We have obligations to our clients in terms of obviously the briefs that we file with this Court, we have an obligation to this Court to make sure the information in those documents is accurate, and it just poses a very significant impediment to all defendants' ability to do that if we have to make these sorts of arrangements and, you know, negotiate with each other in terms of who gets to walk up to the computer next, how long are they going to stay there. You know, at the last minute these documents change, and when that happens, are we going to have to take last-minute flights here, are we going to have to have someone stationed here for two weeks while we are drafting the brief? There's just all sorts of logistical issues like that that defendants would have to face.

THE COURT: Well, part of what was brought up, and GM brought this up too, we were doing this -- I mean some we won't need because they settled so that would be the end, and maybe as we go along it won't be needed because they have settled. But if we do this according to our class cert

schedule, we are only doing a few class certs at a time, so that would limit the number of folks who have to look at the computer, as you say, at any one time.

MS. SMEDLEY: So that is something that I was planning to get into on our objection, but I'm happy to begin to address it now.

THE COURT: I know these two motions are overlapping, but go ahead.

MS. SMEDLEY: Yes. So we also have significant concerns about staggered discovery based on the class cert schedules and largely because with respect to defendants, it produces an inequitable result. The downstream discovery from the OEMs is not part specific, it will be produced -- it's data related to the total vehicle so it reflects information about all parts in the, you know, total vehicle. That's being produced at one time when it is ready, probably shortly after these objections are resolved.

And because defendants are limited to accessing that information only when the class cert schedule is set but plaintiffs who are in every single case will have access to it right away, it could be years before a later parts case defendant is able to see this discovery, and meanwhile plaintiffs have had it the whole time and are able to use it to prepare, you know, to support their claims of passthrough. Meanwhile the defendants who are in this case -- a later case

against the same plaintiffs, you know, are not permitted to access that information until a class cert schedule was set, and as we have seen so far in this litigation, sometimes that takes a very long time, where basically plaintiffs will be getting a head start in litigating this very critical issue of passthrough against those later case defendants.

So I think that is our main concern about that, and we would request -- that is one of the two restrictions that we are asking Your Honor to eliminate by upholding our objection.

THE COURT: Okay. Thank you. Anything else?

MS. SMEDLEY: Just a couple other things. I think the existing protective order has been effective. As Mr. Williams mentioned, the parties have produced very sensitive information, and the protective -- the highly confidential designation in the protective order has been working just fine for that, we have not had problems. The Court sits here able to enforce that protective order if need be. And we have authority in our briefs both that it is not proper for the producing party to assume that the existing protective order is ineffective and also that outside counsel is routinely provided with highly-sensitive information because they are not considered to be the same as their client.

There is one case I think that both parties

referred to, it is Cherdak vs. FitClub. And in that case the court ordered production of source code, which is highly sensitive, to a direct competitor -- outside counsel for a direct competitor of the producing party because the court did not accept that outside counsel should be excluded, this is the language from the case, since they, unlike the plaintiff, are not direct competitors of the opposing party.

So I guess the point is that we have alternatives here. We -- you know, there is a lot of precedent that producing this information, highly sensitive though it is, to outside counsel is an effective way of protecting that information and allaying the concerns of the OEMs.

There are also several source code cases that we have cited I believe where alternatives are presented in those cases for source code where they are not necessarily located in one place, where everybody has to travel in order to use them. There is one where that information is produced to the other side and just required to be kept in a locked room. There is another where a source code was made available on an electronic portal and login information was provided by the producing party. And there are a couple other examples.

But, you know, the difference in those cases also is that they were dealing with usually a single requesting party, and, you know, so those accommodations were made even

though they are just looking at the burden on this one requesting party. And in our case we are encountering even greater difficulties because we have so many requesting parties who would need access to that information.

THE COURT: Okay. Thank you.

MS. SMEDLEY: Thank you.

MR. WOLFSON: Your Honor --

MR. WILLIAMS: May I make one very brief point? What counsel just said reminded me I meant to say, and then I will sit down again.

THE COURT: All right.

MR. WILLIAMS: I just wanted to make one point. When counsel was talking about the staggering of this production or the access of the information to align it with the class certification schedules, at this time the parties are spending significant efforts on resolution, and I'm sure the Court is aware of this but I want to say this is certainly a very critical issue to those decisions as well. So for parties who would be staggered out down the road, this type of information could be very influential in their evaluation of whether and how to resolve one of the pending cases.

THE COURT: Thank you. Mr. Wolfson.

MS. SMEDLEY: Just one more point.

THE COURT: We all don't get two shots, but go

ahead.

MS. SMEDLEY: I will make this quick. To follow up on what Mr. Williams just said, we think this -- we are engaged in mediation right now, some of the later case defendants, and this is critical information that would really help us be able to evaluate the claims, our defenses, and hopefully move mediation along and further a speedy resolution.

THE COURT: Okay. Now, Mr. Wolfson, you better hurry up and get up there.

MR. WOLFSON: I'm bookending the arguments here, Your Honor.

I have specific responses to various points that counsel made, but I'm curious whether Your Honor has specific questions based -- to start.

THE COURT: No.

MR. WOLFSON: Okay.

THE COURT: Go ahead.

MR. WOLFSON: So, first, to address something that Mr. Williams said, that GM is the only one who has made statements about general approach to pricing, I believe that's incorrect. In the opposition to the original motion to compel, the OEMs on the whole submitted a substantial number of declarations regarding the business and why they thought that the discovery was overbroad, why it was in some

respects perhaps assuming too much about the process of how the OEMs sold cars, and those OEMs also provided some input, insight and input regarding how they actually go about pricing their automobiles.

With respect to what the other of the first five or first six --

THE COURT: Six.

MR. WOLFSON: -- OEMs have provided, we are somewhat at a disadvantage there because we don't know what they have. We -- the Special Master Esshaki I think rightly siloed out the conversations on specifics of the OEMs' documents and data. So when a representation was made to the Court, well, the other five OEMs have provided this, I can't substantively respond because I don't know what's there. However, I can tell you that GM has provided deposition testimony explaining exactly why this is so important to GM.

And frankly, the fact that the other OEMs' pricing methodologies that may be different in certain material respects is actually the whole reason that GM doesn't want to have to produce this here. It doesn't want it to get out because these are competitive trade secrets. Honda has its own trade secrets, GM has its own, Ford, all of these companies, they price their cars in their own proprietary way, and that's something that --

THE COURT: GM is the only one that has objected to

the Master's order?

MR. WOLFSON: Yes, I believe we are the only one that raised our own objection on this. Portions of our objections were joined by the other OEMs specifically with respect to the protective order, and then I believe that Honda also joined -- we note in our brief --

THE COURT: Toyota?

MR. WOLFSON: I don't have it right in front of me, Your Honor, but there are footnotes explaining where other OEMs join in our objection.

Now, the idea that the parties need to be able to test on both sides what GM has said about its pricing methodology, of course, but that's where the data comes in. We are giving them our purchase data, including our contracts and any pricing terms in those contracts that affect the price. Automobile manufacturers often have what is known as an APR, an automatic price reduction, that occurs on an annual or other some sort of periodic basis. So what you have is changes in the prices as they go into the cars, and what they are also going to have on the end is the changes in the price of those cars that incorporate those products.

With respect to the bills of materials, Mr. Williams said, and he's right, that we have an aggregate bill of materials. That was a constraint of GM's system, just what data is available. I believe this is not revealing

anything confidential. It is just more that if we had to go back and put a part-by-part bill of materials, it would have been terabytes of data for one quarter, so it is a feasibility issue. But again, the price indexes are not going to change what the actual cost of the car was and they are going to have the input cost and the input prices from the contracts and the purchasing data that we are providing.

So to the extent there are incremental differences in the price of the parts going into those cars, they are going to have those prices, they are going to have the total cost of the car and they are going to have the end price of those cars for every month for the past 12 to 14 years. So we are giving them the MSRP data, and essentially they are going to be able to reconstruct a lot of this from what data we were able to reasonably get after significant discussions and explanations and work with the Special Master.

The cases that Mr. Williams cites where producing internal pricing methodology documents is -- to say that this is routine, this is done all the time, we point this out in our brief, but those are where the party is a party -- where the -- you know, the producing party is actually typically in the case.

We -- we continue to believe that they have everything they need to test GM's statements and just in general to assess passthrough, and this is on both sides.

The defendants are telling you they can't test it either, but no one has called into question statements based on an empirical study of the data yet, and that's an important thing to remember because their burden is to show that they need to go beyond what we are producing. We are explaining why what we are producing is enough, and they have said, well, it might not be enough but they haven't actually shown that it is not enough.

THE COURT: Okay. What standard of review should I use to the magistrate judge's --

MR. WOLFSON: We think, Your Honor --

THE COURT: Not magistrate judge, to the Master's.

MR. WOLFSON: Yes. So in our brief we have argued that it is de novo, but we understand that the other parties have said that it is abuse of discretion. From GM's view, it doesn't really change the analysis in the end because the problem is not that -- it is not an issue of the Court needing to revisit the entire thing. If we look at what the parties have actually done, this failure to show, what do you want to call it, absolute need, substantial need, what have you, that's a critical point where they didn't, and when the Special Master nevertheless ordered production, then that would be in error. And I mentioned it before, he said he was on the -- you know, he was essentially on the knife's edge on whether or not to order this at all, and we think he erred by

falling to the side of production. So -- and our view doesn't matter.

THE COURT: Okay. Mr. Williams, let's take the next motion, or who's going to -- okay. I'm sorry, Ms. Smedley.

MS. SMEDLEY: Okay. So defendants' objection to the order on vehicle pricing information. So even though defendants believe that the heightened restrictions that Special Master Esshaki imposed are unnecessary, all of them, and excessive, all of them, in an attempt to move through this as quickly as possible, we have not objected to most of them.

But there are two restrictions that we feel we can't accept because they impose such undue burdens on defendants, and the first one we did begin to talk about, that's the staggered schedule.

I just wanted to provide the Court with an example that this is not a theoretical concern. In the bearings case, which is dying down, the plaintiff counsel just last week indicated to the OEMs that they were still seeking downstream discovery in that case because it is the first case in which the discovery would be available. And so plaintiffs will have the downstream discovery, which is not part specific, as early as it is available from the OEMs, and meanwhile no later case defendant will be permitted to even

try to access it until they have a class cert schedule in that case.

Not only do we think it is inequitable for that reason, we think it is inefficient. There are large-scale inefficiencies for all parties probably because the OEMs are going to need to interact with each parts case as the class cert schedule comes up to produce this information again and again and make sure that the defendants are adhering to the protective -- the heightened protective order restrictions.

We also think it is inconsistent with the point of a multi-district litigation where we are supposed to be coordinating and that this really prevents us from being able to do that if there are common issues we could coordinate on because the defendants who will have access to that critical information will not be able to share it with the later case defendants.

Also I will -- I don't know if you have the same standard of review question for us but --

THE COURT: I do.

MS. SMEDLEY: Okay. So we also think it is de novo here because the Special Master made no finding that GM made a showing of good cause, as is required under Sixth Circuit precedent, in order to get these heightened protections, and in the -- and under Rule 53, findings of fact and conclusions of law would be reviewed by Your Honor de novo.

So there is also -- there is a balancing act that takes place where the Special Master should balance the injury or the harm that GM expects by disclosing their vehicle pricing information under the protective order that exists against our need for the information and the burdens that the heightened restrictions will place on defendants.

So I believe with respect to the staggered discovery issue, that covers most of our concerns.

THE COURT: Okay.

MS. SMEDLEY: And the other restriction we are asking you to eliminate on this objection is that the order requires defendants in each parts case to choose one defense firm to keep the actual pricing information documents. Those are kept, you know, on -- in accordance with the other restrictions that we have not challenged here, on a standalone computer, you know, people will log in, it's not networked.

And the problem is that similarly to the logistical difficulties that we discussed, if the materials were just located in one place at GM, defendants have the same problems in terms of having to travel to a certain location in order to use these documents in potentially time-sensitive situations and with this one-custodian firm idea.

Additionally, the one -- the single-custodian firm is then in a different situation than the other defendants in

the same parts case because they have access to this information all the time, and meanwhile other defendants will have to make specific arrangements to come and use this -- come and view this information whenever they need it.

So there are different inequities here that we are hoping the Court will help us avoid so that we can adequately represent our clients.

THE COURT: Okay. Anything else?

MS. SMEDLEY: The only other -- the one thing I would like to say is that GM has to show good cause here for the heightened protections, and they have to do that with a particular and specific demonstration of fact, which we don't believe they have done. The concerns they have expressed have not been specific, that they -- that somehow even though this protective order is in place that has worked for the rest of us, somehow their information is going to get out there into the public I guess.

THE COURT: Well, in this day and age you could understand their concern.

MS. SMEDLEY: I could if we hadn't had years --

THE COURT: All you have to do is turn the television on and you know why.

MS. SMEDLEY: Yes. But I think, you know, in the context of this MDL, it is harder for me to accept that that is, you know, imminent -- an imminent concern.

But additionally, you know, some of the concerns that they have articulated is that the materials will get to their competitors who, as Mr. Williams said, are not involved in OEM discovery; those are the DPPs. They were concerned that the information would go to their suppliers, the defendants, their customers, the IPPs. And again, you know, by producing the pricing information to outside counsel, we really avoid those issues because counsel is not the same as their clients, and we have to this point been very diligent about making sure any information shared with our clients is in accordance with the protective order and redacted if need be.

So GM has not sufficiently identified specific harm that might come to it if they produce pricing information under the existing protective order, not to mention that we have these additional protections that the Special Master imposed and we are not challenging, one of which actually is that any filing that contains or refers to this information is supposed to be filed in camera with Your Honor, not electronically at any time, and so we think that should significantly reduce the concerns that GM has articulated.

THE COURT: Uh-huh.

MS. SMEDLEY: In which case there isn't good cause for these restrictions, and we would ask that you strike down those too.

THE COURT: Okay. Thank you. Mr. Wolfson?

MR. WOLFSON: Thank you, Your Honor.

So with respect to -- I would like to first address possible GM's showing of good cause. I mean, at this point I'm not sure what else we could do. We had our CFO under oath explain just how sensitive these materials are. That they are limited to a few dozen people at a corporation of tens of thousands because they are so sensitive. That they are kept under lock and key within GM because they are so sensitive. That they would be devastating to GM's business because it would be -- if they got out to competitors, suppliers, customers, any of the three groups of parties that are at issue here. We think that's good cause.

And if the fact that highly sensitive materials was just going to outside counsel was enough to just put in a typical protective order, then we would never have protective orders that have the highest level of protection like for things like source code or, say, the recipe for Coke. We believe that we have satisfied that burden.

We submit on the facts that we've submitted as part of this briefing process that that is good cause, and that at the December 9th hearing the Special Master, in fact, noted, he acknowledged that they are trade secrets and he acknowledged that there would be substantial harm to GM, a third party, if they were obtained improperly by one of the

parties to the case or one of the third parties to the case.

To the extent that there is complaints that there is one defense firm per case who is allowed access to this information, as an initial matter, of course, we -- our objection is it shouldn't have to be produced at all. Assuming Your Honor disagrees and orders the production, this is why it should be experts only because then there is not the issue of having to have -- you know, well, which defense firms gets access to these materials. It is more the experts have access to it, they are allowed to use it for economic or econometric analyses, and that should be it.

The practicalities and logistics here of protecting this information we also think are not as dire as the defendants make them sound. I mean, this, I believe, is a subset of all of the attorneys that have appeared before you today, and the parties routinely come to Detroit. This is a Detroit-focused case. What we are proposing is that the materials be made available at a GM-controlled location in Detroit. The parties are here, they come here often.

To the extent there is an argument that this would create issues for, I think the quote was, potentially some time-sensitive situations, this is an MDL with a long schedule ahead of it, and the parties have ample lead time to look at this information and decide whether they want to use it for their analyses.

So the idea that for the first time the parties are going to be coming in and looking at these materials in Detroit two weeks before an ultra-critical brief, we find that a little bit hard to believe, and we would say this is a -- it is -- we are all professionals, we can schedule out the time to go and check and look at evidence long before it becomes the last minute.

THE COURT: Now, also -- I'm sorry, just to go to another subject, plaintiff argued that they needed industry experts to have access, and, of course, that's what you oppose. Could you address that?

MR. WOLFSON: Sure. The industry expert question, at least -- let me look at my notes of what Mr. Williams said -- that they would -- that they are often used, and I acknowledge this, I have seen it in other cases, the experts will describe why the industry is subject to collusion, why increasing, you know, the amount of collusion and bids would affect prices that then, you know, impact the OEMs. All of that sort of information is, from our perspective, readily available through other sources. You are going to have discovery from the defendants about the RFP process, from GM at least; you are going to have information about its purchases through the RFP process; you are going to then have the end prices; you have substantial discovery from, for example, auto dealer plaintiffs who they are able to provide

discovery about how they deal with the OEMs when purchasing.

The structure of the industry is not necessarily information that's going to require GM's secret sauce. And going back to that connecting piece of whether there were passthroughs, our understanding is that would be more on the econometric or economic expert side. And that on the industry side, to the extent there is anything that GM produces that's relevant to the questions they are asked to opine on, that, again, our deposition testimony and the data and documents we have already agreed to produce would be more than sufficient to provide that expert the data that they need.

So that would be our response on the industry expert side, Your Honor. And, again, this is -- the idea that we would have unfettered veto power by having the ability to object to experts, I think again that might be a bit overstated because this is not something where we are saying we want to be able to exclude all experts.

Rather, this is the econometric experts, the economic experts that are going to be providing damages or class cert opinions. We want to make -- we would to like to know if there is a procedure that they would like where it would be kept confidential from other parties just literally for conflicts purposes or for particular reasons that we articulate in a protective order for objecting, we would be

willing to do that. But the idea of being able to object to experts seeing this type of material, at least in cases I have litigated, it is not that uncommon, but it depends on it being this highest level of types of material.

Those are the main points I wish to address.

THE COURT: Okay. Thank you. Anyone else?

MS. SMEDLEY: To address counsel's concern about the experts and our ability to keep the information confidential from our parties including other OEMs, I think the fact that Mr. Wolfson couldn't tell the Court anything about what the other OEMs have agreed to produce is a great example of the fact that we are capable of doing that. We have -- the serving parties have taken great care to file all of their briefs under seal and only serve them on the appropriate OEMs. Our clients have not seen that information. So, you know, it's already happening that that information as sensitive is being protected under the existing protective order and now we have these few heightened restrictions that will help do that even more.

The extreme protective measures that GM is advocating for today are really usually reserved for source code and the recipe for Coke, the examples that counsel gave. You know, to analogize it to GM itself, I would think this would be more appropriate for an innovative technology that they are working to develop that's going to set their cars

ahead of other cars. They have -- I know they have a vehicle-to-vehicle communication technology that has been, you know, attributed to them as a significant advancement, and that is really the sort of thing that these extreme measures would be appropriate for as opposed to pricing methodology which every business has. So I also -- you know, there is a concern here I think about the precedent this sets.

Every party on the business side of things has a pricing methodology, and are we at the point where they are going to be able to come into court, point to an opinion from this MDL and say, well, look, this is what is appropriate because we have a pricing methodology that we think is unlike other companies' pricing methodologies?

Oh, with respect to the experts, there's a significant concern for defendants in terms of, I mean, one, not being able to check this data because we have an obligation under Rule 11 to ensure that our experts are relying on accurate -- are accurately relying on facts. So this whole arrangement where experts only and GM gets a chance to, I guess, review in detail how the information is being used is of great concern to us.

I think lastly I will just say that the vast majority of the pricing information that we are seeking is not recent. We have not asked for current information, we

haven't asked for any from last year. You know, this goes all the way back -- I believe the early part of our range was back in the -- it is back in the '90s.

So, you know, when courts are assessing the harm that a producing party might suffer, that matters. Is it current information that's going to undermine you today or is it from 20 years ago? And, you know, presumably the way you priced cars back then is not -- who would necessarily conclude that it is exactly the same as you are doing it today?

So I think that's something to take into consideration is that we are asking for, you know -- even if we -- if there is a specific time period GM is concerned about, I mean, you know, maybe there's -- there's some element to discuss here. But the older documents and data we feel like should not be subjected to additional restrictions, and not even -- certainly not the ones -- the two that we are asking you to eliminate today.

So I think that's it.

THE COURT: Okay. You hear if it is not broken, don't fix it, so maybe that methodology has worked all of these years, I don't know.

MR. WILLIAMS: I have four quick points. I know Mr. Wolfson wanted to go as well. Do you want to go first?

MR. WOLFSON: Why don't you go.

MR. WILLIAMS: Thank you.

MR. WOLFSON: Yeah.

MR. WILLIAMS: I will try to be very brief and mindful of the time. Steve Williams for end payors.

The first point, when counsel was arguing it and we were talking about this issue of other cases, I had argued initially that in other indirect purchaser antitrust cases, this type of discovery about how pricing decisions are made by retailers or manufacturers is routinely provided, and counsel had -- in fact, I did say it is difficult to find decisions on it because it is typically not even litigated and objected to.

Counsel had responded by saying, well, those were parties. I just want to be clear, no, those were not parties. I'm talking about cases just like this where it is indirect purchasers suing defendants alleged to have engaged in a cartel who sold component parts to a manufacturer who then sells, for example, TVs or computers. Those are the cases I'm talking about where we get that information from Apple or Dell or Microsoft or Best Buy.

The second point was also -- I might have misstated -- counsel had said that I had said no other OEM had made the argument about costs not being passed through. I hadn't meant to say that. What I intended to say and I believe is correct is no other OEM is objecting to producing

this information, only General Motors is objecting to producing it.

The third point, I think in the last argument made by GM they made the suggestion that all of the information should be experts only, and I just want to make sure the Court hears our position that the data, yes, end payors, we are not arguing that the data has to go to the attorneys, that's for the experts. But this narrower set of documents that are not data documents, we do not believe would be appropriate to preclude counsel from looking at something that's going to be to us critical to an important issue.

And then finally on the issue of having an opportunity to veto --

THE COURT: That's all this information, as I understand it, that we with are talking about right now, the quote/unquote crown jewels.

MR. WILLIAMS: The data, experts only, what I understand is the small, the very small volume of what GM --

THE COURT: But the data has been given already according to --

MR. WILLIAMS: Is or will be, yeah.

But the crown jewel data, as GM refers to it, that's the information that I think would be inappropriate to only let experts see. Attorneys need to see that, they need to understand it, they need to be able to test it.

Finally, it is a practical issue. On the suggestion that GM have an opportunity to object to an expert who it is proposed be given information, I would note because of how long the case has gone on, most of the parties have their experts and have invested substantial time with those experts and substantial resources. And the risk that would then create is someone who has already worked on this case for parties for many years would then be subject to an objection at this late date. Thank you.

THE COURT: Thank you. Mr. Wolfson?

MR. WOLFSON: Yes. I will be very brief, Your Honor, I promise.

I really just want to respond to the final points that defense counsel made about every company has a pricing method and that this is old versus new data.

With respect to the old data, I think Your Honor hit it on the head: if it ain't broke, don't fix it. And we have submitted evidence that just because some materials are a few years old doesn't necessarily mean that we would -- well, that it would mean if we have more recent data, it doesn't matter and it wouldn't harm GM if it came out. So we have submitted materials on that with our brief and I would just like to point that out.

With respect to the idea that this would create some kind of unwelcome precedent for all future cases, that's

why we have standards and burden shifting and that's why GM has come in. We are a third party so we unquestionably have protections under Rule 45 and the case law, so that's the baseline.

Second, we made our showing this is a trade secret. We made a showing also of substantial harm. The question here is the serving parties' showing, and that this is just the typical approach. If a third party makes a showing of trade secrets or highly confidential information, then we get down to the showing of substantial need, absolute need that the serving parties need to make, and our point is that they have not made that. So that is -- this is a case-specific, fact-specific inquiry just applying old law.

THE COURT: Okay. Thank you.

MR. WOLFSON: Thank you.

THE COURT: All right. The Court is going to issue an opinion on this shortly. I appreciate the arguments, and we will see where it goes. Thank you.

Is there anything else?

MR. WILLIAMS: No, Your Honor.

THE COURT: All right. Have a good summer.

MR. WILLIAMS: Thank you, Your Honor.

MR. WOLFSON: Thank you, Your Honor.

THE LAW CLERK: All rise. Court is adjourned.

(Court recessed at 3:08 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of In Re: Automotive Parts Antitrust Litigation, Case No. 12-02311, on Wednesday, June 7, 2017.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 06/22/2017

Detroit, Michigan